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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 116.

CHARLES G. CHEVER, PLAINTIFF IN ERROR,

vs.

J. W. HORNER AND HENRY E. ROGERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED SEPTEMBER 24, 1888.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	2
Caption	3	2
Transcript from district court of Arapahoe county	4	2
Caption	4	2
Transcript from county court	5	3
Complaint	5	3
Summons	7	4
Sheriff's return	8	5
Answer of Rogers	9	5
Answer of Horner	10	6
Reply to answer of Horner	12	7
Motion of Horner to strike out parts of reply	15	10
Hearing of motion to strike out parts of reply	17	11
Affidavit of Charles G. Chever	17	11
Judgment for defendants and new trial granted	18	11
Motion for new trial	19	12
Order setting motion for hearing	20	13
Order granting motion for continuance	20	13
Order granting leave to withdraw papers	20	13
Præcipe for subpœnas	21	13
Consent to set cause for trial	21	14

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	Original.	Print.
Order entering order to strike out parts of reply	22	14
Order commencing hearing	23	15
Orders continuing hearing	23	15
Order taking cause under advisement	24	16
Order setting cause for reargument	24	16
Judgment for plaintiff	25	16
Allowance of appeal to district court	26	17
Appeal bond	26	17
Clerk's certificate	27	18
Order setting cause for hearing	28	18
Motion to strike out parts of replication	29	19
Order to strike out parts of replication	31	20
Judgment for defendant Horner	31	20
Allowance of appeal to supreme court of Colorado	32	21
Order as to bill of exceptions	32	21
Motion for new trial	33	21
Appeal bond	34	22
Bill of exceptions	37	24
Exhibit A—Receiver's certificate to Hall, May 6, 1865	37	24
B—United States patent to Hall, July 1, 1868	38	25
C—Deed from Hall to Kent, March 16, 1867	40	26
D—Deed from Kent to Downing, August 1, 1867	43	29
E—Deed from Downing to Clough, Sept. 23, 1869	45	31
F—Deed from Clough to Kingsley, Sept. 22, 1873	49	33
G—Copy of share No. 11 to F. Dorsett	54	37
Testimony of Miers Fisher	55	37
Exhibit H—Deed from F. Dorsett, Jr., to R. R. Dorsett, July 21, 1861, &c.	57	39
I—Deed from R. R. Dorsett to F. Dorsett, Jr., March 20, 1863	62	42
J—Power of attorney from F. Dorsett, Jr., to Chever, May 15, 1863	64	44
K—Deed from F. Dorsett, Jr., by attorney, to E. Berard, December 23, 1864	65	45
L—Deed from E. H. L. Berard to Chever, January 5, 1865	68	47
M—Deed from Kingsley to Chever, May 7, 1875	71	49
Testimony of R. H. McMann	75	52
Motion for nonsuit denied	77	53
Exhibit 1—Deed from Downing to Hughes, Oct. 24, 1867	78	54
2—Deed from Hughes to Horner, Nov. 26, 1870	81	56
3—Decree in Horner *vs.* Patterson *et al.*	83	57
Amended decree in Horner *vs.* Patterson *et al.*	86	60
Oath of commissioners in Horner *vs.* Patterson *et al.*	88	61
Report of commissioners in Horner *vs.* Patterson *et al.*	89	61
Final decree in Horner *vs.* Patterson *et al.*	90	63
Clerk's certificate in Horner *vs.* Patterson *et al.*	91	63
Testimony of Robert Steele	94	65
Judge's certificate to bill of exceptions	97	67
Clerk's certificate	98	67
Assignment of errors	99	68

	Original.	Print.
Joinder in error	102	69
Order fixing time for submission	103	70
Judgment	104	70
Opinion	106	71
Motion for rehearing	121	78
Order denying rehearing	123	79
Petition for writ of error	124	80
Citation (copy)	125	81
Bond	127	81
Præcipe for transcript	129	82
Clerk's certificate	130	83
Bill of exceptions	131	83
Opinion	134	85
Chief justice's certificate	145	91
Assignment of errors	146	91
Citation (original)	149	92
Proof of service of citation	150	93
Clerk's certificate	151	93

1 *Writ of Error to —— Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

The President of the United States to the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, between Charles G. Chever and J. W. Horner and Henry E. Rogers, a manifest error hath happened, to the great damage of the said Charles G. Chever, as by his petition appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given; that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, this 31st day of May, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the 112th year.

WILLIAM A. WILLARD, *Clerk,*
By F. W. TUPPER, *Deputy Clerk.*

Allowed by—
—— ——, *Judge.*

Fees, $1.00, paid by pl'ff in error.

2 [Endorsed:] Gen. No., —. —— court of the United States. Charles G. Chever, plaintiff in error, *vs.* J. W. Horner and Henry E. Rogers. Writ of error to supreme court of the State of Colorado. Filed in —— court of the U. S. this — day of ——, A. D. 18—. —— ——, clerk, by —— ——, deputy clerk. J. Q. Charles, attorney for plaintiff in error. Filed in the supreme court Jun- 1, 1888. James A. Miller, clerk.

Return.

The United States of America, }
State of Colorado, } *ss:*

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal Supreme Court,
State of Colorado.

Witness my hand and the seal of said supreme court, at Denver, in said State, this 4th day of June, A. D. 1888.

JAMES A. MILLER,
Clerk of the Supreme Court of the State of Colorado.

3 Pleas before the honorable the supreme court of the State of Colorado.

State of Colorado, *ss:*

Be it remembered that heretofore and on, to wit, the 28th day of November, A. D. 1883, came the appellant, Charles G. Chever, by John Q. Charles and Henry C. Dillon, Esquires, his attorneys, and filed in the office of the clerk of the supreme court of the State of Colorado a duly certified transcript of the record and proceedings of a certain cause lately pending in the district court of Arapahoe county and State aforesaid, wherein Charles G. Chever was plaintiff and John W. Horner and Henry E. Rogers were defendants, and which said cause was brought into said supreme court upon appeal from the judgment of said district court entered in said cause, and which said transcript of record and his assignment of errors appended thereto are respectively in words and figures following, to wit:

4 State of Colorado, }
County of Arapahoe, } *ss:*

District Court, Arapahoe County.

Pleas in the district court of the second judicial district of the State of Colorado, sitting within and for the county of Arapahoe, before the Honorable Victor A. Elliott, judge of the second judicial district, at a special term thereof appointed to be begun and holden and begun and holden at the court-house, in the city of Denver, county of Arapahoe, and State of Colorado, on the 14th day of November, A. D. 1882, pursuant to the former order of this court, duly made and entered of record at the last regular term thereof.

Present: Honorable Victor A. Elliott, judge of the district court of the second judicial district of the State of Colorado; David B. Graham, Esq., district attorney of said district; Michael Spangler, Esq., sheriff of said county; Henry Sparnick, Esq., clerk of said court.

5	CHARLES G. CHEVER *vs.* HENRY E. ROGERS and JOHN W. HORNER.	6508. Ejectment. Appeal from County Court.

Be it remembered that heretofore and on, to wit, the 22nd day of December, A. D. 1882, came the said defendants, by L. P. Marsh, Esq., their attorney, and filed herein a transcript of the proceedings had in said cause in the county court of said county.

And said transcript is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA.

STATE OF COLORADO, *Arapahoe County*, } *ss:*

In County Court, January Term, A. D. 1879.

Pleas before the Honorable Benj. F. Harrington, judge of the county court within and for the county of Arapahoe, State aforesaid, and at a term thereof begun and held at the court house, in the city of Denver, in said county, on the first Monday (being the — day) of January, in the year of our Lord one thousand and eight hundred and seventy-nine, and of the Independence of the United States the one hundred and fourth.

Present: Benj. F. Harrington, judge; Michael Spangler, sheriff.
Attest: R. W. STEELE, *Clerk*.

Be it remembered that on, to wit, the 25th day of February, A. D. 1879, the same being one of the regular days of the January term of said court in said year, comes the plaintiff and files herein his complaint; which said complaint is in the words and figures following, to wit:

STATE OF COLORADO, *County of Arapahoe*, } *ss:*

In the County Court of said County.

6	CHARLES G. CHEVER, Plaintiff, *vs.* HENRY C. ROGERS and JOHN W. HORNER, Defendants.	Action for the Recovery of Real Estate.

The plaintiff in the above-entitled cause, complaining of said defendants, complains and alleges:

I. That he, the said plaintiff, is seized in fee of the following-described property, situate, lying, and being in the county of Arapahoe and State of Colorado, and more particularly described as follows, to wit: Lot numbered ten (10), in block number one hundred and seventy-six, in the east division of the city of Denver; and the said plaintiff further states that he is entitled to the possession of the said premises, and that the said defendant, Rogers, wrongfully withholds the premises from him.

II. That one John W. Horner claims title to and interest in said premises adversely to the said plaintiff; wherefor- the said plaintiff makes the said John W. Horner one of the defendants to this action.

III. That the said plaintiff was, prior to the twenty-third day of May, A. D. eighteen hundred and seventy-three, lawfully possessed of said premises in fee simple, and that on or about the thirtieth day of May, in the said last-mentioned year, the said defendant entered said premises and wrongfully ousted the plaintiff and wrongfully withholds the possession thereof from the said plaintiff, to his demage of two hundred dollars.

That the value of the property in this controversy does not exceed two thousand dollars.

Wherefore the plaintiff demands judgment—

1. For the possession of said premises.
2. For the sum of two hundred dollars damage for the withholding of the same, together with costs of suit.

INGERSOLL & CRATER,
Att'ys for Plaintiff.

7 State of Colorado,
County of Arapahoe, } *ss:*

Charles G. Chever, of lawful age, upon being first duly sworn, upon his oath deposes and says that he is the plaintiff in the above-entitled cause; that he has read the above and foregoing complaint, and that the same is true of his own knowledge except as to those matters which are therein stated on his information or belief, and as to those matters he believes them to be true.

CHAS. G. CHEVER.

Subscribed and sworn to before me this 25th day of February, A. D. 1879.

O. A. HATTEN, *Clerk.*

Endorsed as follows:

3180. County court. Charles G. Chever *vs.* Henry E. Rogers, John W. Horner. Complaint. Filed Feb'y 25, 1879. O. A. Hatten, clerk. Ingersoll & Crater.

And thereupon there issued out of said court a summons directed to defendants; which said summons is in the words and figures following, to wit:

State of Colorado,
County of Arapahoe. }

In the County Court of Arapahoe County Aforesaid, to the March Term, A. D. 1879.

Charles G. Chever, Plaintiff,
vs.
Henry E. Rogers and John W. Horner, Defendants. } Summons.

The people of the State of Colorado send greeting to Henry E. Rogers and John W. Horner, defendants above named:

You are hereby required to appear in an action brought against

8 you by the above-named plaintiff in the county court of the county of Arapahoe, it being in the 2nd judicial district of the State of Colorado, to answer the complaint filed therein within ten days, exclusive of the day of service, if served within this county, or if served out of this county but in the said judicial district within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of the complaint.

The said action is brought to recover the possession of the following-described property, to wit: Lot number ten (10), in block number one hundred and seventy-six (176), in the east division of the city of Denver, in the county of Arapahoe and State of Colorado, and for the sum of two hundred dollars damages for the withholding of the same, as will more fully appear by the complaint on file herein, to which reference is here made.

And you are hereby notified that if you fail to appear and answer the said complaint as above required the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and seal of the county court within and for the said county of Arapahoe this 25th day of Feb'y, A. D. 1879.

O. A. HATTEN, *Clerk.*

Endorsed as follows:

Charles D. Chever, plaintiff, *vs.* Henry E. Rogers *et al.*, defendants. Summons. County court.

And afterwards, on, to wit, the 26th day of Feb'y, A. D. 1879, comes the sheriff and files herein the summons heretofore issued, with the return written thereon; which said return is in the words and figures following, to wit:

STATE OF COLORADO,
County of Arapahoe, } *ss:*

9 I do hereby certify that I have duly executed the within summons on this twenty-sixth day of February, A. D. 1879, by delivering a true copy thereof to each of the within-named defendants, viz., John W. Horner and Henry E. Rogers, at Denver, in said county.

DAVID J. COOK, *Sheriff,*
By JOHN WALKER, *Deputy.*

Endorsed as follows:

No. —. Chas. G. Chever, plaintiff, *vs.* Henry E. Rogers *et al.*, defendants. Summons. County court. Filed this 26th day of Feb'y, A. D. 1879. O. A. Hatten, clerk. Sheriff's fees: Service, $2.00, mileage, $0.60; total, $2.60. Ingersoll & Crater.

And afterwards, on, to wit, the 7th day of March, A. D. 1879, comes defendant Rogers and files herein his answer; which said answer is in the words and figures following, to wit:

County Court, Arapahoe County.

CHARLES G. CHEVER, Pl'ff,
vs.
HENRY E. ROGERS, Impleaded, etc., Def'ts.

The defendant Henry E. Rogers, answering the plaintiff's complaint, says—

That he has not nor can he obtain information sufficient to form a belief as to whether the plaintiff has or is entitled to any estate or interest in the lands and premises described in the complaint herein.

Wherefore this defendant prays judgment for his costs.

Dated March 7th, 1879.

THOMAS GEORGE,
Attorney for Def't.

ARAPAHOE COUNTY, *ss.*

Henry E. Rogers, being duly sworn, says that he is one of the defendants in the above-entitled action, and that the foregoing answer is true of his own knowledge except as to the matters
10 therein stated on information and belief, and as to those matters he believes it to be true.

H. E. ROGERS.

Subscribed and sworn to before me this 7th day of March, A. D. 1879.

O. A. HATTEN, *Clerk.*

Endorsed as follows:

3180. County court. Charles G. Chever *vs.* Henry E. Rogers, impleaded, etc. Answer of def't Rogers. Filed March 7th, 1879. O. A. Hatten, clerk. T. George, att'y for def't Rogers.

And afterwards, on, to wit, the same day, comes defendant Horner and files herein his answer; which said answer is in the words and figures following, to wit:

STATE OF COLORADO,
County of Arapahoe, } *ss.*

In the County Court.

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } Action for the Recovery of Real Property.

The defendant John W. Horner, for answer to the complaint filed herein, says—

1st. For a first defense to said action as follows:

1st. That the plaintiff is not seized in fee of lot ten (10), in block one hundred and seventy-six (176), in the east division of the city of Denver, in the county of Arapahoe, in the State of Colorado, as alleged in said complaint; that said plaintiff was not at the time this suit was commenced and is not now entitled to the possession of said premises, and that said defendant Rogers did not at the time this suit was brought and does not now wrongfully withhold said premises from said plaintiff.

2nd. For a second defense to said action says as follows:

1st. That he not only admits that said John W. Horner claims title to an interest in said premises in said complaint described, but
alleges that he is the owner in fee simple of the whole of
11 said premises; that the defendant Rogers at the time this
suit was commenced was in possession of said premises as his tenant, and that neither he nor his said tenant wrongfully withholds said premises from said plaintiff.

3rd. For a third defense to said action says as follows:

1st. That said plaintiff was not on the twenty-third day of May, 1873, or at any time thereafter lawfully possessed of said premises described in said complaint in fee simple; that this defendant did not, on or about the thirtieth day of May, A. D. 1873, or at any other time, wrongfully oust said plaintiff from said premises, and does not wrongfully withhold the possession of said premises from said plaintiff, and that said plaintiff has not been damaged by reason of the withholding of said premises from him in the sun of two hundred dollars or any other some whatever.

4th. For a fourth defense to said action says as follows:

That on the 24th day of March, A. D. 1876, the plaintiff herein, in the district court of the county of Arapahoe, in the then Territory (now State) of Colorado, commenced an action of ejectment against one Sarah Bethley for the possession of the identical premises described in the complaint filed herein, claiming the title to said premises in fee simple; that the said Sarah Bettley was then, for a long time prior to that time had been, and for a long time thereafter continued in possession of said premises, and during the time she occupied said premises as the tenant of this defendant and one John Hughes; that issue had joined between said plaintiff and said defendant in said cause; that said cause was afterwards removed by virtue of the laws of the State of Colorado by change of venue to the district court of the county of Jefferson, in the State of Colorado, and on the 23rd day of November, A. D. 1877, in said last-named court, the issue in said cause was tried and a judgment rendered in said cause in favor
of said defendant and against said plaintiff; that said judg-
12 ment has not been vacated, set aside, or annulled, and that
said plaintiff has not since the commencement of said suit acquired any title to said premises.

Wherefore defendant prays judgment that this cause be dismissed and that he may be awarded his costs in this suit most wrongfully sustained.

R. D. THOMPSON,
Att'y for Above Defendant.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

John W. Horner, being first duly sworn, states upon oath that he is one of the defendants in the above-entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated upon information, and as to those matters he believes it to be true.

JOHN W. HORNER.

Subscribed and sworn to before me this 7th day of March, A. D. 1879.

O. A. HATTEN, *Clerk.*

Endorsed as follows: 3180. Charles G. Chever *vs.* Henry E. Rogers and John W. Horner. Answer of Jno. W. Horner. Filed March 7. '79. O. A. Hatten, clerk. J. W. Horner, att'y *pro se.* R. D. Thompson, att'y for Horner.

And afterwards, on, to wit, the 17th day of March, A. D. 1879, comes the plaintiff and files herein his reply, etc.; which said reply is in the words and figures following, to wit:

STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the County Court of said County.

13 CHARLES G. CHEVER, Plaintiff,
vs.
HENRY E. ROGERS and JOHN W. HORNER, Defendants. } Action to Recover Possession of Real Property.

The plaintiff in the above-entitled cause, replying to the answer of the said defendant Horner in the above-entitled cause, replies, states, and alleges:

First. The said plaintiff denies that the said defendant Horner is the owner in fee simple of the whole of said premises or any part thereof.

Second. The said plaintiff, further replying, says that he admits that on the twenty-fourth day of March, A. D. eighteen hundred and seventy-six, he commenced an action of ejectment against one Sarah Bethley for the possession of the identical premises described in the complaint filed herein, claiming the title to the said premises in fee simple, and the said plaintiff is informed and believes that the said Sarah Bethley was at that time a tenant of the said defendant and another as is in and by said answer alleged and set forth, and the plaintiff further admits that said cause was afterwards removed by change of venue by virtue of the laws of the State of Colorado to the district court of the county of Jefferson, in the State of Colorado, as is in and by said answer alleged and set forth.

But this plaintiff denies that on the twenty-third day of November, eighteen hundred and seventy-seven, or at any other time in said last-named court the issues in said cause was tried in said court as in and by said answer it is alleged and set forth.

And further denies that any judgment was at any time ever rendered in said court in said cause upon the issues of said action and upon the merits thereof.

But this plaintiff further states that on the twenty-third day of November, A. D. eighteen hundred and seventy-seven, a
14 pretended or *ex parte* trial was had of said cause in the said district court of the county of Jefferson and that a pretended judgment was rendered against the said plaintiff in said cause; that at said trial the said plaintiff was not personally present or represented by counsel or otherwise; that upon said trial no evidence was introduced on the part or behalf of the said plaintiff's cause of action, were not tried or presented in any manner whatever to the district court of the county of Jefferson.

That said last-mentioned court rendered said judgment without authority of law; that the said court had no power or authority to render the said judgment, and that the same is absolutely null and void.

And plaintiff further states that the issues joined between the said plaintiff and the said defendant Bethley in said action in the said district court of the said county of Jefferson were not at any time judicially inquired into and determined, nor were the same ever submitted to judicial inquiry and determination in said court, and that no judgment was ever rendered in said cause in said last-mentioned court upon the merits of the plaintiff's cause of action in said cause.

Wherefore the said plaintiff demands judgment as he hath already demanded.

INGERSOLL & CRATER,
Att'y's for Pl'ff.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Charles G. Chever, of lawful age, upon being first duly sworn, upon his oath deposes and says that he is the plaintiff in the above-entitled cause; that he has read the above and foregoing reply to the answer of the said defendant Horner, and that the same is true of his own knowledge except as to those matters which are therein stated on his information or belief, and as to those matters
15 he believes them to be true.

CHAS. G. CHEVER.

Subscribed and sworn to before me this 17th day of March, A. D. 1879.

ROBERT H. MA'MANN,
[SEAL.] *Notary Public.*

Endorsed as follows: 3180. County court. Charles G. Chever, pl'ff, *vs.* John W. Horner *et al.*, def'ts. Reply to answer of defendant Horner. Filed March 17th, 1879. O. A. Hatten, clerk. Ingersoll & Crater.

And afterwards, on, to wit, the 27th day of March, A. D. 1879, comes defendant Horner and files herein his motion, etc.; which motion is in the words and figures following, to wit:

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the County Court.

CHARLES G. CHEVER, Pl'ff,
vs.
HENRY E. ROGERS and JOHN W. HORNER, Def'ts.

And now comes the said defendant Horner and moves to strike out from the replication of the said plaintiff to the answer of the said Horner the following portions of said replication, to wit:

All that portion of said replication contained between the 16th and 26th line-, inclusive, of the second page of said replication, and for the following reasons, to wit: It is irrelevant, redundant, immaterial, and insufficient in this—

It clearly appears from the pleadings herein that in the action of said Chever *vs.* Bethley, that said Chever submitted to the jurisdiction of the court (being a court of general jurisdiction) which rendered the said judgment in said cause against said plaintiff; and also clearly appears that in said action of Chever *vs.* Bethley that issue was joined between the plaintiff and defendant therein, and that judgment was rendered in favor of said Bethley.

16 And the rule of law is well settled that when jurisdiction is obtained over the person and the subject-matter in a court of general jurisdiction no error can make the judgment void.

Second. All that portion of the replication contained between the 27th and 33rd lines, inclusive, of the second page, inclusive of the third page of replication, for the reason that it is irrelevant, redundant, immaterial, and insufficient in this: In said action of Chever *vs.* Bethley judgment was rendered by a court of general jurisdiction after jurisdiction had been obtained over the said parties to said action and in favor of the defendant therein, and even though the court may have committed error in rendering said judgment the said plaintiff herein can take no advantage of any such error in this action.

Third. All that portion of said replication contained between the 13th and 19th lines, inclusive, of page three of said replication, for the reason that it states a conclusion of law and does not state a fact, and is therefore redundant, irrelevant, and insufficient.

It is also redundant and immaterial in this: The judgment was rendered by a court of general jurisdiction and after the parties to said suit of Chever *vs.* Bethley had submitted to its jurisdiction, and therefore plaintiff cannot in this action attack said judgment.

Fourth. All that portion of said replication contained between the 19th and 33rd lines, inclusive, of page three of said replication, for the reason that it is redundant, irrelevant, and insufficient in this—

1st. It alleges a conclusion of law; and, 2nd, the pleadings of this action show that in said action of Chever *vs.* Bethley the district court of said Jefferson county gave judgment upon the issues joined in said cause in said Jefferson county district court, and the said plaintiff herein is bound by said judgment even though the proceedings in said cause of Chever *vs.* Bethley were irregular.

17 J. W. HORNER,
Att'y pro se.
R. D. THOMPSON,
Att'y for Def't Horner.

Endorsed as follows: 3180. County court. Chas. G. Chever *vs.* John W. Horner, H. E. Rogers. Motion to strike out certain parts of replication. Filed March 27th, 1879. O. A. Hatten, clerk. R. D. Thompson, att'y for def't Horner.

And afterwards, to wit, on the 3rd day of April, A. D. 1879, the following order was had and entered of record in said court, to wit:

CHAS. G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, comes the said plaintiff, by Messrs. Ingersoll & Crater, his attorneys, and the said defendant-, by John W. Horner, Esq., their attorney, also comes, and thereupon came on to be heard the motion of the said defendants to strike out certain portions of the said plaintiff's replication herein; which said motion is argued by counsel, at the conclusion of which the judgment of the court is reserved until another day.

And afterwards, on, to wit, the 9th day of January, A. D. 1880, comes the plaintiff and files herein his affidavit; which said affidavit is in the words and figures following, to wit:

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Charles G. Chever, of lawful age, upon being first duly sworn, deposes and says that he is one of the plaintiffs in a certain cause now pending and undetermined in the county court of said county,
18 wherein John W. Horner and H. E. Rogers are defendants; that upon the trial of said cause the said plaintiff is desirous of using certified copies of the following deeds and conveyances of lot number ten (10), in block number one hundred and seventy-six, as follows: Copy of share No. 11 of Denver Town Company to Folsom Dorsett, copy of conveyance or deed from Folsom Dorsett to Rudolph R. Dorsett, certificate of recorder of United States to James Hall, probate judge; United States patent or deed to James Hall, copy of deed from Omer O. Kent *copy of deed from Ober O. Kent* to Jacob Downing, copy of deed from Jacob Downing to Henry A. Clough, copy of deed from Henry A. Clough to William

C. Kingsley; also copy of filing made by Charles G. Chever in probate judge's office on said lot; and deponent further saith that the original of each and all of said copies are not in the possession or power of this plaintiff to produce.

CHAS. G. GHEVER.

Subscribed and sworn to before me this 2nd day of January, 1879.

O. A. HATTEN, *Clerk.*

Endorsed as follows: Charles G. Chever, plaintiff, *vs.* John W. Horner *et al.*, defendants. Affidavit of loss of original papers. Filed January 9th, 1880. O. A. Hatten, clerk. Ex. G. 3180. B. F. H. Ingersoll & Crater, for plaintiff.

And afterwards, on, to wit, the 27th day of May, A. D. 1880, the following order was had and entered of record in said court, to wit:

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, came the said plaintiff, by Messrs. Ingersoll
19 & Crater, his attorneys, and the said defendants, by John W. Horner, Esq., their attorney, also come, and thereupon the court, having heretofore heard the evidence and arguments of counsel herein and the judgment of the court having been held under advisement and the court being sufficiently advised in the premises, doth find the issue herein joined for the said defendants.

Whereupon the said plaintiff, by his attorney, moves the court here for a new trial of this action, which is granted him upon the payment of the costs that have accrued in this action.

And afterwards, on, to wit, the 7th day of June, A. D. 1880, comes the plaintiff and files herein his motion; which said motion is in the words and figures following, to wit:

STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the County Court in and for said County.

CHARLES G. CHEVER, Pl'ff,
vs.
HENRY E. ROGERS and JOHN HORNER, Def'ts. } Motion for New Trial.

The plaintiff in the above-entitled cause, by Ingersoll & Crater, his attorneys, moves this court for a new trial of the same, and for his reasons states:

1st. That the verdict and decision made therein on the trial of the same was against the evidence.

2nd. That the verdict and decision made and entered therein on the trial thereof was against the law.

3rd. That errors in law occurred at the trial thereof and were duly excepted to by the plaintiff's attorneys.

INGERSOLL & CRATER,
Att'ys for Pl'ff.

Endorsed as follows:

3180. County court. Chas. G. Chever *vs.* Henry E. Rogers *et al.* Motion for new trial. Filed June 7th, 1880. O. A. Hatten, clerk. Ingersoll & Crater, att'ys for pl'ff.

20 And afterwards, on, to wit, the 26th day of May, A. D. 1881, the following order was had and entered of record in said court, to wit:

CHAS. G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, on motion of defendant, this cause is set for trial for Wednesday, June 15th, at 9 o'clock a. m.

And afterwards, on, to wit, the 15th day of June, A. D. 1881, the following order was had and entered of record in said court, to wit:

CHAS. G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, comes the said plaintiff, by Messrs. Charles & Dillon, his attorneys, and the said defendants, by J. W. Horner, Esq., their attorney, also come; and thereupon comes on to be heard the motion of plaintiff for continuance herein, which is argued by counsel; at the conclusion of which, and the court being fully advised in the premises, it is considered by the court that the motion be, and the same is hereby, granted on condition that he pay all costs of this hearing, setting cause for trial at this time, and jurors' fees and witnesses and costs of summoning jury and witnesses, which are in no event to be recovered of defendants.

And afterwards, on, to wit, the 18th day of July, A. D. 1881, the following order was had and entered of record in said court, to wit:

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

21 Now, on this day, on his motion, H. C. Dillon, attorney for plaintiff, has leave to withdraw reply to answer, answer of Horner, complaint, notice to take deposition, and affidavit of Crater for one day.

And afterwards, on, to wit, the 12th day of August, A. D. 1881, comes the plaintiff and files herein his præcipe; which said præcipe is in the words and figures following, to wit:

C. G. CHEVER
vs.
ROGERS.

The court will please issue subpœnas for Henry Jacobs and Michael G. Corcoran in the above-entitled cause.

CHARLES & DILLON,
Att'ys for C. G. Chever.

Endorsed as follows:

County court. Chever *vs.* Rogers. Filed August 12th, 1881. R. W. Steele, clerk. Charles & Dillon, att'ys for plaintiff.

And afterwards, on, to wit, the 9th day of August, A. D. 1881, comes the plaintiff and files herein his consent; which said consent is in the words and figures as follows, to wit:

Law Office Charles & Dillon, 340 Larimer St.
John Q. Charles. Henry C. Dillon.

DENVER, COLO., 188–.

CHARLES G. CHEVER
vs.
H. E. ROGERS *et al.*

This case may be set for trial on any day between August 15th and 20th, and plaintiff shall be present and his testimony on and in lieu of deposition.

CHARLES & DILLON, *For Pl'ff.*

Endorsed as follows:

Filed August 9, 1881. R. W. Steele, clerk.

22 And afterwards, on, to wit, the 17th day of August, A. D. 1882, the following orders were had and entered of record in said court, to wit:

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER.
3180. Relief.

Now, on this day, comes the defendant J. W. Horner and moves the court here to have entered of record the order made in this cause on the 29th of May, A. D. 1879, striking out certain parts of the replication filed herein; and it appearing to the court from an inspection of the records herein that Amos Steck, then judge of this court, in open court ordered, on the said 29th day of May, 1879, certain parts of the plaintiff's replication stri-ken out, but that owing to the negligence of O. A. Hatten, the then clerk of this court, the said order has never been entered of record, and the court being fully advised in the premises, it is ordered by the court that the said order be entered of record this day for and as of the 29th day of May, A. D. 1879; which order is as follows:

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

This cause coming on to be heard upon the motion of the defendant- to strike out certain parts of plaintiff's replication, and thereupon the court having heretofore heard the arguments of counsel on said motion, and the judgment of the court having been reserved, and the court being now fully advised in the premises, it is considered by the court said motion be, and the same is hereby, denied, except as to the words "that the said last-mentioned court rendered said judgment without authority of the law; that the said court had no power or authority to render the said judgment,
23 and that the same is absolutely null and void," found between lines thirteen and nineteen, on page three, of plaintiff's replication, which said words are ordered to be stricken out.

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, comes the said plaintiff, by H. C. Dillon, Esq., his attorney, and the said defendant-, by J. W. Horner, Esq., their attorney, also come; and thereupon comes on to be heard the trial of the issues herein joined, both the said parties expressly waiving a jury; and thereupon comes the evidence until the hour of adjournment, when the further hearing herein is postponed until Thursday, September 1st, 1881, at 9 o'clock a. m.

And afterwards, on, to wit, the 1st day of September, A. D. 1882, the following order was had and entered of record in said court, to wit:

CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, come again the said parties, by their attorneys, and thereupon comes a continuance of the evidence herein, at the conclusion of which begin the arguments of counsel, which continues until the hour of adjournment, when the further hearing of the argument- is continued until another day.

And afterwards, on, to wit, the 6th day of September, A. D. 1882, the following order was had and entered of record in said court, to wit:

24 CHARLES G. CHEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 3180. Relief.

Now, on this day, on motion of H. C. Dillon, Esq., his attorney, the defendants' further argument of this cause is set for hearing for Wednesday, September (?), A. D. 1881, at 9 o'clock a. m.

And afterwards, on, to wit, the 7th day of September, A. D. 1882, the following order was had and entered of record in said court, to wit:

CHARLES G. CHEVER
vs. } 3180. Relief.
HENRY E. ROGERS and JOHN W. HORNER.

Now, on this day, come again the said parties, by their attorneys, and thereupon comes on to be heard a continuation of the arguments of counsel; at the conclusion of which, and the court not being fully advised in the premises, the judgment of the court is reserved until another day.

And afterwards on, to wit, the 30th day of October, A. D. 1882, the following order was had and entered af record in said court, to wit:

CHARLES G. CHEVER
vs. } 3180. Relief.
HENRY E. ROGERS *et al.*

Now, on this day, on motion of said plaintiff, by H. C. Dillon, Esq., his attorney, this cause is set for reargument for Saturday, November 25th, A. D. 1882, at 9½ o'clock a. m.

And afterwards, on, to wit, the 25th day of November, A. D. 1882, the following order was had and entered of record in said court, to wit:

25 STATE OF COLORADO,
County of Arapahoe, } *ss:*

In the County Court of said County.

CHARLES G. CHEVER, Pl'ff,
vs. }
HENRY E. ROGERS and JOHN W. HORNER, Def'ts.

And now, on this day, comes again the plaintiff, by Charles & Dillon, his attorneys, and the said defendants, by Lucius P. Marsh, their attorney, also come, and this cause having been heretofore tried by the court, a trial by jury having been waived by the said parties, and the same having been argued by counsel, and the court having taken the cause under advisement, and the cause being now argued by counsel, and the court, being now sufficiently advised in the premises, doth find the issues herein joined for the plaintiff against the said defendants.

Second. That Charles G. Chever, the plaintiff above named, is the owner in fee simple and entitled to have and recover of and from the said defendants and all persons claiming by or through them or either of them the premises described in the complaint herein, to wit lot number ten (10), in block number one hundred and seventy-six (176), in the East Division of the city of Denver, in the county of Arapahoe and State of Colorado.

Third. That the said plaintiff is entitled to have and recover of and from the said defendant John W. Horner for his damages sustained for the unlawful ouster and detention of said premises by the said defendant John W. Horner the sum of five cents.

Wherefore it is considered, ordered, and adjudged by court that the said plaintiff, Charles G. Chever, hath an estate in fee simple of, in, and to the premises in said complaint mentioned, to wit, lot number ten (10), in block number one hundred and seventy-six (176), in the East Division of the city of Denver, in the county of Arapahoe, in State of Colorado, and is entitled to have and recover of and from the said defendants and any person or persons
26 claiming possession thereof in privy with the said defendants or either of them, and that a writ of restitution issue therefor.

And it is further considered, ordered, and adjudged by the court that the plaintiff do have and recover of and from the said defendant John W. Horner the sum of five cents as damages in this behalf sustained, together with the costs of this suit, and that execution issue therefor.

And thereupon defendant John W. Horner prays an appeal to the district court of Arapahoe county, which is allowed on condition that he file herein his bond in appeal in the penal sum of $500, conditioned as required by law and with good and sufficient sureties, to be approved by the clerk of this court, within ten days from the date thereof.

Nov. 25th, 1882.

BENY F. HARRINGTON, *Co. Judge.*

Endorsed as follows:

3180. In the county court, Arapahoe county, State of Colorado. Charles G. Chever, pl'ff, *vs.* Henry E. Rogers and John W. Horner, def'ts. Order. Filed November 25th, 1882. R. W. Steele, clerk, by K. P. Mace, deputy.

And afterwards, on, to wit, the 5th day of December, A. D. 1882, comes the defendant and files herein his appeal bond; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, John W. Horner, Vincent D. Markham, and P. H. Palmer, of the county of Arapahoe and State of Colorado, are held and firmly bound unto Charles G. Chever in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors,
27 and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated at Denver this twenty-fifth day of November, in the year of our Lord one thousand eight hundred and eighty-two.

The condition of the above obligation is such that whereas the said Charles G. Chever did, on the twenty-fifth day of November, one thousand eight hundred and eighty-two, at a term of the county court then being holden within and for the county of Arapahoe, in the State of Colorado, obtain a judgment against the above-bounden John W. Horner for the costs of suit and for the possession of certain premises in the complaint in such behalf described and on file in said court, from which judgment the said John W. Horner has prayed for and obtained an appeal to the district court of said county:

Now, if the said John W. Horner shall prosecute said appeal with effect and without delay and shall pay all costs and whatever judgment may be awarded on the trial or dismissal of said appeal in the district court against the said John W. Horner, the party so appealing, and shall moreover pay the amount of said judgment appealed from, with costs of suit, in case said appeal is dismissed, then said obligation to be null and void; otherwise to remain in full force and effect.

JOHN W. HORNER.
VINCENT D. MARKHAM.
P. L. PALMER.

Approved by me this 5th day of December, A. D. 1882.
ROBERT W. STEEL, *Clerk,*
By K. P. MACE, *Deputy.*

Endorsed as follows:

3180. Appeal bond. The county court — county, State of Colorado. Charles G. Chever *vs.* John W. Horner. Filed Dec. 5th, 1882. R. W. Steele, clerk, by K. P. Mace, deputy. Total costs, $71.75. $10.00. Paid by defendant.

28 I, R. W. Steele, clerk of the county court of Arapahoe county, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the pleadings, process, and return thereof, all orders of court and appeal bond, in a certain cause lately depending in said court, on the civil side thereof, wherein Charles G. Chever was plaintiff and Henry E. Rogers *et al.* defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Denver this 22nd day of December, A. D. 1882.

[SEAL.] R. W. STEELE, *Clerk.*

Endorsed as follows:

6508. Transcript of proceedings in suit. County court, Arapahoe county. January term, 1879. In the matter of Chas. G. Chever *vs.* Henry E. Rogers *et al.* Filed December 22, 1882. Henry Sparnick, clerk.

And afterwards and on, to wit, the 2nd day of March, A. D. 1883, the same being one of the regular juridical days of the January term, the following proceedings, *inter alia,* were had and entered of record in said court, to wit:

CHARLES G. CHEVER }
vs. } 6508. Relief.
HENRY E. ROGERS *et al.* }

At this day comes the said plaintiff, by H. C. Dillon, Esq., his attorney, and the said defendants, by L. P. Marsh, their attorney, also come; and thereupon, it being suggested that the judge of this court has heretofore been engaged as counsel herein, both parties thereto consenting—

It is ordered by the court that this cause be set for trial on Thursday, the 3rd day of May proximo, before the Hon. Chester C. Carpenter, judge of the first judicial district of the State of Colorado, acting as presiding judge.

29 And afterwards and on, to wit, the same day, come the said defendant, John W. Horner, and filed herein his motion to strike out parts of the replication herein.

And said motion is in the words and figures following, to wit:

In the District Court.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

CHARLES G CHEVER, Plaintiff, }
vs. }
HENRY E. ROGERS and JOHN W. HORNER, Defendants. }

And now comes the defendant Horner and insists upon his motion filed in the county court, from which court this case was brought to this court by appeal, to strike out from the replication to the answer of defendant Horner the following portions of said replication, and, that there may be no misunderstanding as to the portions of said replication covered by said motion, again moves the court to strike out from said replication as follows—that is to say, all contained in the second paragraph of said replication.

1st. The words "But this plaintiff denies that on the twenty-third day of November, eighteen hundred and seventy-seven, or at any other time, in said last-named court the issues in said cause was tried in said court, as in and by said answer it is alleged and set forth."

Because it is irrelevant, redundant, immaterial, and improper matter to take issue upon under the pleadings in this case.

2nd. The words "And further denies that any judgment was at any time ever rendered in said court in said cause upon the issues of said action and upon the merits thereof."

Because the same are irrelevant, redundant, immaterial, and insufficient to take issue upon as a defense in this cause under the pleadings in said cause. 30

3rd. The words "But this plaintiff further states that on the twenty-third day of November, A. D. eighteen hundred and seventy-seven, a pretended or *ex parte* trial was had of said cause in the said district court of the county of Jefferson, and that a pretended judgment was rendered against the said plaintiff in said cause;

that at said trial the said plaintiff was not personally present or represented by counsel or otherwise; that upon said trial no evidence was introduced on the part or behalf of the said plaintiff, and that the merits of the plaintiff's cause of action were not tried or presented in any manner whatever to the district court of the county of Jefferson."

Because they are irrelevant, redundant, immaterial, and insufficient as matter in defense of this action under the state of the pleadings in this cause.

4th. The words "That the said last-mentioned court rendered said judgment without authority of law; that the said court had no power or authority to render the said judgment, and that the same is absolutely null and void."

Because they are improper and not sufficient as matter of defense to this action.

5th. The words "And plaintiff further states that the issues joined between the said plaintiff and the said defendant Bethley in said action in the said district court of the said county of Jefferson were not at any time judicially inquired into and determined, nor were the same ever submitted to judicial inquiry and determination in said court, and that no judgment was ever rendered in said cause in said last-mentioned court upon the merits of the plaintiff's cause of action in said cause."

Because they are redundant, irrelevant, immaterial, and insufficient matter as defense to said action, and improper to be put in issue in said cause.

J. W. HORNER,
Attorney pro se.

31 Endorsed as follows:

No. 6508. Charles G. Chever *vs.* Henry E. Rogers and John W. Horner. Motion of Horner to strike parts of plaintiff's replication from the files. Filed March 2, 1883. Henry Sparnick, cl'k. J. W. Horner, att'y *pro se.*

And afterwards and on, to wit, the 3rd day of May, A. D. 1883, the same being one of the regular juridical days of the April term, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

CHARLES G. CHEEVER
vs.
HENRY E. ROGERS and JOHN W. HORNER. } 6508. Relief. Appeal from County Court.

At this day comes the said plaintiff, by H. C. Dillon, Esq., his attorney, and the said defendants, by L. P. Marsh, Esq., their attorneys, also come; and thereupon this cause comes on for trial before the Honorable Chester C. Carpenter, judge of the first judicial district of the State of Colorado, sitting herein at the request of Honorable Victor A. Elliott, and by consent of both parties hereto, in accordance with the terms of an order in that behalf heretofore entered herein.

And the motion of the said defendants to strike out certain parts of the plaintiff's replication, coming on to be heard, is argued by counsel, and the court, being now sufficiently advised in the premises, doth deny said motion except as to the words "that the said last-mentioned court rendered said judgment without authority of law; that the said court had no power or authority to render the said judgment, and that the same is absolutely null and void," found between lines thirteen and nineteen, on page 3, of plaintiff's replication, which said words are ordered to be stricken out.

32 And thereupon this cause comes on for trial by the court without a jury, both parties hereto expressly waiving a jury herein; and the court, having heard the evidence produced herein, as well on behalf of the said defendants as of the said plaintiff, doth find the issues herein joined for the defendant John W. Horner, and that he is entitled to the possession and that he is the owner of the property in controversy herein.

And thereupon the plaintiff moves the court for a new trial in this behalf, which motion is denied by the court; and, the defendant Horner moving for judgment upon the findings of the court—

It is considered, ordered, and adjudged by the court that the defendant John W. Horner is the owner of and entitled to possession of the property in the complaint mentioned, being lot number ten (10), in block number one hundred and seventy-six (176), in the east division of the city of Denver, Arapahoe county, Colorado, and that the defendant John W. Horner have and recover of and from the plaintiff his costs in this behalf laid out and expended by him, and that he have execution therefor.

And thereupon the said plaintiff prays an appeal to the supreme court of the State of Colorado, which is allowed upon condition that he file within sixty days (60) from this day his appeal bond in the penal sum of two hundred and fifty dollars ($250), with sureties to be approved by the clerk of this court.

And time and until ninety (90) days from this day is allowed the said plaintiff within which to prepare and tender to the judge of this court his bill of the exceptions by him reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this day.

And on the same day came the said plaintiff, by Charles & Dillon, his attorneys, and filed herein his motion for a new trial.

And said motion is in the words and figures as follows, to wit:

33 In the District Court.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

CHARLES G. CHEVER, Plaintiff,
vs.
HENRY E. ROGERS and JOHN W. HORNER,
Defendants.
} Motion for a New Trial.

And now comes the plaintiff, by H. C. Dillon, Esq., his attorney, and moves the court to set aside the findings and verdict of the court herein, and on the third day of May, A. D. 1883, found and returned upon the trial of this cause, and to grant a new trial of this action for the following reasons:

1st. Because it appears from the records and files of this court and action that this court has and had no jurisdiction to try said cause.

2nd. Because the court erroneously admitted evidence to be introduced in this cause and trial on the part of the defendants, contrary to the objection of the plaintiff.

3rd. Because the court rejected material, competent, and relevant testimony offered in this cause on said trial on behalf of the plaintiff.

4th. Because the findings and verdict made and rendered on said trial should have been for the plaintiff instead of the defendant Horner.

5th. Because the evidence produced upon the said trial does not support the said findings and verdict of the court.

6th. And for other good and sufficient reasons appearing from the proceedings and record of the said trial and cause.

CHARLES & DILLON,
Plaintiff's Attorneys.

Endorsed as follows:

6508. Charles G. Chever *vs.* H. E. Rogers *et al.* District court, Arapahoe county. Motion for a new trial. Filed May 3rd, 1883. Henry Sparnick, clerk, by C. R. Knowles, deputy. Charles & Dillon, pl'ff's att'ys.

34 And afterwards and on, to wit, the 14th day of May, A. D. 1883, came the said plaintiff, by Charles & Dillon, his attorneys, and filed herein his appeal bond.

And said appeal bond is in the words and figures as follows, to wit:

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

In the District Court for the 2nd Judicial District for the State of Colorado, Sitting within and for the said County of Arapahoe.

CHARLES G. CHEVER, Plaintiff,
vs.
JOHN W. HORNER and HENRY E. ROGERS, Defendants.
} Undertaking on Appeal.

Whereas Charles G. Chever, the plaintiff in the above-entitled action, is about to appeal to the supreme court of the State of Colorado from a final judgment entered against him in said action in the said district court in favor of the said defendant, John W. Horner, on the 3rd day of May, A. D. 1883, for costs of suit and for possession and ownership in fee of lot 10, in block 176, in the east division of the city of Denver, county and State aforesaid, as is more particularly set forth and shown by the said judgment; and

Whereas the said plaintiff hath prayed for and been allowed an appeal from the said final judgment to the said supreme court upon condition that he file with the clerk of said court a good and sufficient undertaking on appeal in the sum of $250.00, condition- as required by law, with sureties to be approved by the clerk of said court, on or before the expiration of sixty days from the said 3rd day of May, 1883:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Robert H. McMann and Edward E. Chever, of the county of Arapahoe and State of Colorado, do hereby jointly and severally undertake and promise on the part of the said appellant, Charles G. Chever, that the said appellant will pay the amount of the said judgment and all damages, costs, and interest which may be awarded against him on said appeal in case the said judgment shall be affirmed or upon a dismissal thereof, not exceeding the said sum of $250.00, and that the said appellant will duly and diligently prosecute the said appeal.

To which amount and conditions aforesaid we do hereby acknowledge ourselves jointly and severally bound.

ROBERT H. McMANN. [SEAL.]
EDWARD E. CHEVER. [SEAL.]

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Robert H. McMann and Edward E. Chever, being each first duly sworn, deposes and says that they are householders and freeholders of the State of Colorado; that they reside in the city of Denver, in the county and State aforesaid, and are each the owners of property over and above their just debts and liabilities and property exempt from levy and sale on execution in the aggregate value of two hundred and fifty dollars ($250.00).

ROBERT H. McMANN.
EDWARD E. CHEVER.

Subscribed and sworn to before me this 12th day of May, A. D. 1883.

[SEAL.] GRANVILLE MALCOM,
Notary Public.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

Robert H. McMann and Edward E. Chever, whose names are subscribed to the above bond, each personally appeared before me this day and acknowledged, each for himself, that he had signed, sealed, and delivered the same as his free act and deed for the uses and purposes therein set forth.

Given under my hand and notarial seal this twelfth day of May, A. D. 1883.

[SEAL.] GRANVILLE MALCOM,
Notary Public.

Endorsed as follows:

36 6508. State of Colorado, county of Arapahoe. In the district court, 2nd dist. Charles G. Chever *vs.* John W. Horner and Henry E. Rogers. Undertaking on appeal. Approved and filed this May 4th, 1883. Henry Sparnick, cl'k. Charles & Dillon, att'ys for plaintiff.

And afterwards and on to wit, the 1st day of June, 1883, came the said plaintiff, by Charles — Dillon, his attorneys, and filed herein his bill of exceptions.

And said bill of exceptions is in the words and figures as follows, to wit:

37 STATE OF COLORADO, }
Arapahoe County, } *ss:*

CHARLES G. CHEVER }
vs. } Transcript of Evidence.
H. E. ROGERS and JOHN W. HORNER. }

Mr. DILLON: I first offer in evidence, if your honor please, the certificate of the receiver of the land office to James Hall, probate judge of Arapahoe county, covering the town site within which this lot is situated, certificate of the receiver showing the entry of this town site.

Mr. MARSH: What is the date of that?

Mr. HORNER: May 6th, 1865.

The certificate here offered in evidence was marked Exhibit A, and is in words and figures following, to wit:

No. 261.

RECEIVER'S OFFICE AT DENVER CITY, C. T., *May 6th*, 1865.

Received from James Hall as probate judge of Arapahoe county, Colo. Ter., in trust for the several use and benefit of the rightful occupants and the *bona fide* owners of the improvements of — county, the sum of eleven hundred ninety-six dollars and sixty cents, being in full for section thirty-three (33) and the west half ($\frac{1}{2}$) of section thirty-four (34), save and except block No. 143 and lots 29, 30, 31, 32, in block 42, and lots No. 28 and 29, in block No. 46 east division Denver city, in township No. three south of range No. 68 west, containing 957 401-1452 acres, at $1.25 per acre.

$1,196.60. C. B. CLEMENTS, *Receiver.*

Filed for record May 7th, A. D. 1865, at 10 o'clock a. m.

TERRITORY OF COLORADO, }
County of Arapahoe, } *ss:*

I hereby certify that the above and foregoing is a true and correct copy from the records in my office as the same appears in Book 7, on page 1.

Witness my hand and official seal this 10th day of March, 1876.

[SEAL.] WILBUR C. LOTHROP,
Clerk & Recorder.

38 Endorsed as follows:
Certificate of receiver. Filed Aug. 17, 1881. R. W. Steele, clerk.

Mr. DILLON: We next offer in evidence the patent from the United States to James Hall, probate judge, of this town site.

The paper here offered in evidence was marked Exhibit "B," and is in words and figures as follows, to wit:

Land Patent.

United States
to
James Hall, probate judge, in trust, etc.

Filed for record Nov. 30th, 1868, 11½ o'clock.
W. D. ANTHONY, *Recorder.*

The United States of America to all to whom these presents shall come, Greeting:

Certificate No. 261.

Whereas James Hall probate judge of Arapahoe county, Colorado Territory, in trust for the several use and benefit of the rightful occupants of Denver city and the *bona fide* owners of the improvements thereon according to their respective interests under the act approved 23rd May 1844 entitled An act for the relief of the citizens of towns upon the lands of the United States under certain circumstances, and also of the act approved 28th May 1864 entitled An act for the relief of the citizens of Denver in the Territory of Colorado, has deposited in the General Land Office of the United States a certificate of the register of the land office at Denver city whereby it appears that full payment has been made by the said James Hall judge as aforesaid, and in trust as aforesaid according to the provisions of the act of Congress of the 24th of April 1820 entitled An act making further provision for the sale of the public lands for section thirty-three and the west half of section thirty-four in township three south of range sixty-eight west, save and except block numbered one hundred and forty-three and lots numbered
twenty-nine, thirty, thirty-one and thirty-two, in block num-
39 bered forty-two and lots numbered twenty-eight and twenty-
nine in block numbered forty-six, east division Denver city
in the district of lands, subject to sale at Denver city, Colorado Territory, containing nine hundred and fifty-seven acres and forty-hundredths of an acre, according to the official plat of the survey of the said lands returned to the General Land Office by the surveyor general, which said tract has been purchased by the said James Hall, judge as aforesaid, and in trust as aforesaid. Now know ye that the United States of America in consideration of the premises and in conformity with the several acts of Congress in such case made and provided have given and granted and by these presents do give & grant, unto the said James Hall judge as aforesaid in trust

for the several use and benefits of the occupants thereof according to their respective interests under said act of 23rd May 1844 and 28th May 1864, and to his successor and assigns in trust as aforesaid the above tract above described. To have and to hold the same together with all the right, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said James Hall, judge as aforesaid in trust for the several use and benefit of the occupants thereof according to their respective interests under said acts of 23rd May 1844 and 28th May 1864 and to his successors and assigns in trust as aforesaid.

In testimony whereof I, Andrew Johnson, President of the United States of America, have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of July in the year of our Lord one thousand eight hundred and sixty-eight and of the Independence of the United States the ninety-second.

By the President

ANDREW JOHNSON,

[SEAL.] Examined By FRANK COWEN, *Secretary*

J. N. GRANGER,
Recorder of the General Land Office.

Recorded vol. 1 page 478.

40 TERRITORY OF COLORADO, }
County of Arapahoe, } *ss:*

I hereby certify that the above and foregoing is a true and correct copy from the records in my office as the same appears of record in Book 20, on pages 135, 136, 137.

Witness my hand and official seal this 10th day of March, 1876.

[SEAL.] WILBUR C. LOTHROP,
Clerk and Recorder.

Endorsed as follows:

United States to James Hall. Filed Aug. 17, 1881. R. W. Steele, clerk.

The COURT: What is the date of that?

Mr. HORNER: July 1st, 1868. I will say that these are copies which it is agreed shall stand as the originals.

Mr. DILLON: I next offer a certified copy of the deed from James Hall, probate judge, to Omer O. Kent, probate judge, successor in office, in trust, dated March 16th, 1867.

The paper here offered in evidence was marked Exhibit "C," and is in the words and figures following, to wit:

Deed.

James Hall, probate judge,
to
Omer O. Kent, successor in office.

Filed for record March 20th, A. D. 1867, at 5 o'clock p. m.

This indenture made this sixteenth day of March A. D. one thousand eight hundred and sixty-seven, by and between James Hall late probate judge of Arapahoe county, Colorado Territory, of the first part and Omer O. Kent, judge of probate of Arapahoe county Colorado Territory of the second part, witnesseth, That whereas by an act of Congress entitled "An act for the relief of the citizens of Denver in the Territory of Colorado" approved May 28th 1864 the probate judge of said county was authorized to enter section numbered thirty-three (33) and the west half (½) of section numbered thirty-four (34) in township numbered three (3) south of range numbered sixty-eight (68) west of the sixth (6) principal
41 meridian, in trust as in said act provided, and whereas James Hall late probate judge of said Arapahoe county did enter said land, save and except block numbered one hundred forty-three (143) and lots twenty-nine (29), thirty (30), thirty-one (31) and thirty-two (32) in block numbered forty-two and lots numbered twenty-eight (28) and twenty-nine (29) in block numbered forty-six in the east division of said city of Denver at the land office in Denver city in pursuance of said act, and whereas the term of office for which the said James Hall late probate judge of said Arapahoe county expired before the trust conferred upon him by said act of Congress was fully executed and completed by means whereof he is unable to fulfil the trust confided to him by said act, and whereas Omer O. Kent was elected and still holds the office of probate judge as successor to the said James Hall, and whereas the trust above described properly belongs to the successor of the said James Hall; Now therefore in consideration of the premises and of the sum of one dollar by the said party of the second part to him paid the party of the first part late probate judge of Arapahoe county, as aforesaid in the execution of the said trust vested in him under and by virtue of the act of Congress aforesaid doth grant, convey and confirm unto the party of the second part, the present probate judge of said Arapahoe county and his successors in office the following described parcel of land, to wit:

Section numbered thirty-three (33) and the west half (½) of section numbered thirty-four (34) in township numbered three (3) south of range numbered sixty-eight (68) west of the sixth (6) principal meridian in the Colorado land district save and except block numbered one hundred and forty-three (143) and lots numbered twenty-nine (29) thirty (30) thirty-one (31) and thirty-two (32) in block numbered forty-two (42) and lots numbered twenty-eight (28) and twenty-nine (29) in block numbered forty-six (46) in the east di-

vision of the city of Denver to have and to hold the above
42 described premises unto the said party of the second part and his successor in office forever in trust for the purposes specified in the act of Congress heretofore mentioned.

In witness whereof the said party of the first part late probate judge aforesaid, hath hereunto set his hand and seal at Denver aforesaid, this the day and year first aforesaid.

JAMES HALL [SEAL]
Late Probate Judge of Arapahoe County, Colorado Territory

Signed, sealed and delivered in presence of
B. B. STILES.
M. M. DELANO.

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I, Philip P. Wilcox, a notary public in and for the county of Arapahoe, in the Territory aforesaid, do hereby certify that James Hall, the probate judge in and for said county, known to me to be the person described in and who executed the foregoing conveyance, — and acknowledged that as such trustee he signed, sealed and delivered the said conveyance as his act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal this sixteenth day of March, A. D. eighteen hundred and sixty-seven.

[SEAL.] PHILIP P. WILCOX,
Notary Public, Arapahoe County, Col. Ter.

TERRITORY OF COLORADO, } ss:
Arapahoe County, }

I hereby certify that the above and foregoing is a true and correct copy from the records in my office as the same appears in Book 16, page 1.

Witness my hand and official seal this 10th day of March, 1876.

[SEAL.] WILBUR P. LOTHROP,
Clerk and Recorder.

Endorsed as follows:

James Hall to Omer O. Kent. Deed. Filed Aug. 17, 1881. R. W. Steele, clerk.

43 Mr. DILLON: I next offer in evidence a certified copy of deed from Omer O. Kent, probate judge, to Jacob Downing, probate judge, his successor in office, dated August 31st, 1867.

The paper here offered in evidence was marked Exhibit "D," and is in the words and figures following, to wit:

Deed.

Omer O. Kent, probate judge,
to
Jacob Downing, successor in office.

Filed for record August 31st, A. D. 1867, at 1½ o'clock p. m.

This indenture made this thirty-first day of August A. D. one thousand eight hundred and sixty-seven, between Omer O. Kent late probate judge of Arapahoe county, Colorado Territory, party of the first part and Jacob Downing, judge of probate of Arapahoe county Colorado Territory, of second part, witnesseth, that whereas by an act of Congress entitled An act for the relief of the citizens of Denver in the Territory of Colorado, approved May 28th A. D. 1864, the probate judge of said county of Arapahoe was authorized to enter section numbered thirty-three (33) and the west half of section numbered thirty-four (34) in township three (3) south of range numbered sixty-eight (68) west of the sixth (6th) principal meridian, in trust as in said act provided, and whereas said James Hall, late judge of probate of said Arapahoe county, did enter said land, save and except block number one hundred and forty-three (143) and lots numbered twenty-nine (29) thirty (30) thirty-one (31) and thirty-two (32) in block numbered forty-two (42) and lots numbered twenty-eight (28) and twenty-nine (29) in block numbered forty-six (46) in the east division of the said city of Denver at the land office in Denver city, in pursuance of said act; and whereas the said James Hall, probate judge did transfer and convey to said Omer O. Kent, probate judge all the remaining interest said Hall had in the said unexecuted trust, and whereas the term of office for which the said Omer
44 O. Kent, probate judge of said Arapahoe county and successor
in office of said James Hall, probate judge, having expired before the trust conferred upon him Omer O. Kent, probate judge by said deed from said James Hall, probate judge, was fully executed and completed, by means whereof he is unable to fulfil the trust confided to him by said deed, and whereas Jacob Downing aforesaid was elected and still holds the office of probate judge as successor to the said Omer O. Kent, and whereas the trust above described properly belongs to the successor of the said Omer O. Kent; Now therefore, in consideration of the premises, and of the sum of one dollar by the said party of the second part to him paid, the party of the first part, late probate judge of Arapahoe county as aforesaid in the execution of the said trust vested in him under and by virtue of the act of Congress aforesaid, and by the said deed from the said James Hall his predecessor in office doth grant, convey and confirm unto the said party of the second part, the present probate judge of said Arapahoe county and to his successors in office, the following-described parcel of land, save and except the exempted part of said trust to wit:

Section numbered thirty-three (33) and the west half of section numbered thirty-four in township three (3) south of range sixty-eight (68) west of the (6th) sixth principal meridian in the Colorado land district, save and except block numbered one hundred and forty-three (143) and lots twenty-nine (29) thirty (30) thirty-one (31) and thirty-two (32) in block forty-two (42) and lots twenty-eight (28) and twenty-nine (29) in block forty-six (46) in the east division of the city of Denver, Colorado Territory, to have and to hold all the above-described premises, unto the said party of the second part and his successors in office forever in trust for the purposes specified in the act of Congress heretofore mentioned.

In witness whereof the said party of the first part late probate judge aforesaid hath hereunto set his hand and seal at Denver
45 aforesaid this the day and year first aforesaid.

[SEAL.] OMER O. KENT,
Late Probate Judge of Arapahoe County, Colorado Territory.

Signed, sealed, and delivered in presence of—
JOHN W. WEBSTER.

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I, John W. Webster, a notary public in and for the county of Arapahoe, in the Territory aforesaid, do hereby certify that Omer O. Kent, late probate judge in and for said county, known to me to be the person described in and who executed the foregoing conveyance, — and acknowledged that as such trustee he signed, sealed, and delivered the said conveyance as his act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal this 31st day of August, A. D. 1867.

[OFFICIAL SEAL.] JOHN W. WEBSTER,
Notary Public.

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I hereby certify that the above and foregoing is a true and correct copy from the records in my office as the same appears of record in Book 14, on pages 215, 216, and 217.

Witness my hand and official seal this 10th day of March, 1876.
WILBUR C. LOTHROP,
Clerk and Recorder.

Endorsed as follows: Deed. Omer O. Kent to Jacob Downing. Filed Aug. 17, 1881. R. W. Steele, clerk.

Mr. DILLON: I next offer a certified copy of a deed from Jacob Downing, probate judge, to Henry A. Clough, as his successor in office, dated September 23, 1869.

The paper here offered in evidence was marked Exhibit "E" and is in words and figures following, to wit:

46 *Deed, Unexecuted Trust.*

Jacob Downing, late probate judge,
to
Henry A. Clough, successor in office.

Filed for record September 23rd, 1869, at 4 o'clock p. m.
W. D. ANTHONY, *Recorder.*

Jacob Downing, late probate judge, to Henry A. Clough, successor in office.

This indenture made this twenty-third day of September in the year of our Lord one thousand eight hundred and sixty-nine, between Jacob Downing, late probate judge of Arapahoe county in the Territory of Colorado, party of the first part and Henry A. Clough, probate judge of Arapahoe county Colorado Territory, and successor in office to the said Jacob Downing, late probate judge as aforesaid party of the second part, witnesseth: That whereas, by an act of Congress entitled An act for the relief of the citizens of Denver in the Territory of Colorado, approved May 28th A. D. (1864) eighteen hundred and sixty-four, the probate judge of said county of Arapahoe was authorized to enter section numbered thirty-three (33) and the west half of section numbered thirty-four (34) in township three (3) south of range sixty-eight (68) west of the sixth (6) principal meridian, in trust as in said act is provided, and whereas said James Hall, late probate judge of Arapahoe county did enter said land, save and except block numbered one hundred and forty-three (143) and lots numbered twenty-nine (29) thirty (30) thirty-one (31) and thirty-two (32) in block numbered forty-two (42) and lots numbered twenty-eight (28) and twenty-nine (29) in block numbered forty-six (46) in the east division of said city of Denver, at the land office in Denver city aforesaid in pursuance of said act. And whereas said James Hall, probate judge did transfer & convey to said Omer O. Kent, probate judge of Arapahoe county, Colorado Territory all the remaining interest said Hall had in the said unexecuted trust, and whereas the said Omer O. Kent, did on the expiration of his term of office as probate judge of said Arapahoe county by deed bearing date the thirty-first day of August A. D. eighteen
47 hundred and sixty-seven, convey to the said Jacob Downing then probate judge of Arapahoe county, the remainder of said trust which remained unexecuted, and whereas the term of office for which the said Jacob Downing late probate judge of Arapahoe county aforesaid and successor in office to the said Omer O. Kent, having expired before the trust conferred upon him, the said Jacob Downing late probate judge by said deed from said Omer O. Kent, late probate judge as aforesaid was fully executed and completed by means whereof he was unable to fulfil the trust confided to him by said deed, and whereas the said Henry A. Clough has been elected to and now holds the office of probate judge of Arapahoe county, Colorado Territory as successor in office to the said

Jacob Downing and whereas the trust above described properly belongs to the successor in office of the said Jacob Downing. Now therefore, in consideration of the premises and of the sum of one dollar by the said party of the second part, to the said party of the first part in hand paid, the receipt whereof is hereby confessed and acknowledged, the said party of the first part, late probate judge of Arapahoe county aforesaid, in the execution of the trust vested in him under and by virtue of the act of Congress aforesaid, and by the said deed from the said Omer O. Kent, late probate judge as aforesaid his predecessor in office doth grant and convey unto the party of the said second part, the present probate judge of said Arapahoe county, and to his successors in office, the following-described parcels of land, save and except the executed part of said trust to wit: Section number thirty-three (33) and the west half of section numbered thirty-four (34) in township three (3) south of range sixty-eight (68) west of the sixth (6) principal meridian in the Colorado land district save and except block numbered one hundred and forty-three (143) and lots twenty-nine (29) thirty (30)
thirty-one (31) thirty-two (32) in block forty-two (42) and lots
48 twenty-eight (28) and twenty-nine (29) in block forty-six (46)
in the east division of the city of Denver, Colorado Territory, to have and to hold all the above-described premises unto the said party of the second part and his successors in office forever in trust for the purposes specified in the act of Congress heretofore mentioned.

In witness whereof the said party of the first part, probate judge aforesaid, hath hereunto set his hand and seal at Denver aforesaid this the day and year aforesaid.

JACOB DOWNING, [SEAL.]
Probate Judge.

Signed, sealed, and delivered in presence of—
—— ——.

TERRITORY OF COLORADO, } *ss:*
County of Arapahoe, }

I, Webster D. Anthony, county clerk of Arapahoe county, Colorado, do hereby certify that Jacob Downing, probate judge of Arapahoe county, who is personally known to me to be the person described in and whose signature appears to the foregoing instrument of writing, appeared before me this day in person and acknowledged that he signed the same freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and official seal this 23rd day of September, A. D. 1869.

[OFFICIAL SEAL.] WEBSTER D. ANTHONY,
County Clerk.

TERRITORY OF COLORADO, } *ss:*
County of Arapahoe, }

I hereby certify that the above and foregoing is a true and correct copy from the records in my office as the same appears in Book 23, on pages 512, 513, and 514.

Witness my hand and official seal the 10th day of March, 1876.

WILBUR C. LOTHROP,
Clerk and Recorder.

Endorsed as follows: Deed. Jacob Downing to Henry A. Clough. Filed Aug. 17, 1881. R. W. Steele, clerk.

49 Mr. DILLON: I next offer a certified copy of a deed from Henry A. Clough, probate judge, to William C. Kingsley, probate judge, as his successor in office, dated October 19, 1873.

Mr. HORNER: September 22, 1873, should be the date. There is a mistake in the abstract.

The paper here offered in evivence was marked Exhibit "F" and is in the words and figures following, to wit:

Deed.

H. A. Clough
to
W. C. Kingsley.

Filed for record December 1st, A. D. 1873, at 1¾ p. m.
W. D. ANTHONY, *Recorder.*

This indenture made this twenty-second day of September in the year of our Lord one thousand eight hundred and seventy-three between Henry A. Clough late probate judge of Arapahoe county in the Territory of Colorado, party of the first part, and William C. Kingsley, probate judge of Arapahoe county, Colorado Territory, and successor in office to the said Henry A. Clough, late probate judge as aforesaid party of the second part, witnesseth, that whereas by an act of Congress, entitled "An act for the relief of the citizens of Denver in the Territory of Colorado" approved May 28, A. D. 1864 (eighteen hundred and sixty-four), the probate judge of said county of Arapahoe was authorized to enter section numbered thirty-three (33) and the west half of section numbered thirty-four (34) in township three (3) south of range numbered sixty-eight (68) west of the sixth (6) principal meridian, in trust as in said act provided, and whereas said James Hall, late probate judge of Arapahoe county did enter said land save and except block numbered one hundred and forty-three (143) and lots numbered twenty-nine (29), thirty (30) thirty-one (31) thirty-two (32) in block numbered forty-two (42) and lots numbered twenty-eight and twenty-nine (28 & 29) in block
numbered forty-six (46) in the east division of said city of
50 Denver, at the land office in Denver city aforesaid in pur-
suance of said act. And whereas said James Hall, probate judge did transfer and convey to Omer O. Kent, probate judge of Arapahoe county, Colorado Territory, all the remaining interest said Hall had in said unexecuted trust, and whereas the said Omer O. Kent, did on the expiration of his term of office as probate judge of

said Arapahoe county by deed bearing date on the thirty-first day of August A. D. eighteen hundred and sixty-seven convey to Jacob Downing then probate judge of Arapahoe county the remainder of said trust which remained unexecuted, and whereas the said Jacob Downing did on the expiration of his term of office as probate judge of said Arapahoe county, by deed bearing date the twenty-third day of September A. D. eighteen hundred and sixty-nine and recorded in Book 23 of Deeds on pages 512, and 513 convey to the said Henry A. Clough then probate judge all of the unexecuted portion of said trust, and whereas the term of office of the said Henry A. Clough late probate judge of Arapahoe county aforesaid, and successor in office to said Jacob Downing having expired before the trust conferred upon him, the said Henry A. Clough, late probate judge by said deed from said Jacob Downing late probate judge as aforesaid, was fully executed and completed by means whereof he is unable to fulfil the trust confided to him by said deed, and whereas the said William C. Kingsley has been elected to and now holds the office of probate judge of Arapahoe county, Colorado Territory as successor in office to the said Henry A. Clough, and whereas the trust above described properly belongs to the successor in office of the said Henry A. Clough. Now therefore, in consideration of the premises and the sum of one dollar by the said party of the second part to the said party of the first — in hand paid, the receipt whereof is hereby confessed and acknowledged, the said party of the first part late probate judge of Arapahoe county aforesaid doth grant and convey unto the party of the second part, the present probate judge of said Arapahoe county, and to his successors in office the following described parcels of lend, save and except the executed 51 part of said trust, to wit: Section numbered thirty-three (33) and the west half of section thirty-four (34) in township (3) south of range sixty-eight (68) west of the sixth principal meridian in the district of lands subject to entry at Denver Colorado, and save and except block numbered one hundred and forty-three (143) and lots twenty-nine (29) thirty (30) thirty-one (31) and thirty-two (32) in block forty-two (42) and lots twenty-eight (28) and twenty-nine (29) in block forty-six (46) in the east division of the city of Denver Colorado Territory, and save and except all the lots and lands within said section numbered thirty-three (33) and the west half of section thirty-four owned and held by the said Henry A. Clough in his own name and not as trustee as aforesaid. To have and to hold all the above-described premises unto the said party of the second part and his successors in office forever in trust for the purposes specified in the act of Congress heretofore specified.

In witness whereof, the said party of the first part late probate judge aforesaid hath hereunto set his hand and seal at Denver aforesaid this the day and year first aforesaid.

Signed, sealed, and delivered in presence of—

HENRY A. CLOUGH. [SEAL.]

TERRITORY OF COLORADO, } ss:
County of Arapahoe,

I, M. L. Horr, of Arapahoe county, Colorado Territory, do hereby certify that Henry A. Clough, late probate judge of Arapahoe county, who is personally known to me to be the person described in and whose signature appears to the foregoing instrument of writing, appeared before me this day in person and acknowledged that he signed the same freely and voluntarily for the uses and purposes therein mentioned.

Witness my hand and notarial seal this 19th day of October, A. D. 1873.

[SEAL.] M. L. HORR,
Notary Public.

52 TERRITORY OF COLORADO, } ss:
County of Arapahoe,

I hereby certify that the above and foregoing is a true and correct copy from the records of my office as the same appears in Book 49 at pages 440 and 441.

Witness my hand and official seal this 10th day of March, A. D. 1876.

[SEAL.] WILBUR C. LOTHROP,
Clerk and Recorder.

Endorsed as follows:

Copy. Henry A. Clough to William C. Kingsley, probate judge. Filed Aug. 17, 1881. R. W. Steele, clerk.

Mr. DILLON: I next offer in evidence, unless your honor will take judicial notice of it, the act of the legislature of the Territory of Colorado in 1872, entitled "An act to provide for the further execution of the trust relating to the town site of the city of Denver," etc., approved February 8th, 1872, Session Laws of 1872. I read from pages 192 and 193.

Mr. MARSH: I apprehend it is not necessary and object. I don't know as it is necessary to encumber the record with it, either.

The COURT: I -resume it is a public act. It may be considered.

Mr. DILLON: I desire to read it.

Mr. MARSH: It will not be put in evidence then. We will not encumber the record with it, Mr. Dillon.

Mr. DILLON: I will not offer it if the court takes notice of it.

Mr. MARSH: So far as the introduction of this statute is concerned, that is withdrawn.

Mr. DILLON: Now, if your honor please, I propose to show, in connection with that statute, that Mr. Chever filed on these lots and has a title from the Denver Town Company to show a compliance on his part with that statute, before the issuing of the Kingsley deed, which I will follow up with the Kingsley deed.

I offer in evidence this book of filings, kept by James Hall, probate judge, in 1865, particularly filing No. 829, on page 207.

53 Mr. Marsh: To save encumbering this record—there is a page and a half of this. You don't want to put the whole book in.

Mr. Dillon: I have a certified copy of it.

Mr. Horner: Just put in your heading and the particular lot.

Mr. Dillon: Just offer the filing and certified copy of it.

Mr. Marsh: The entry on this book is August 7th, 1865, 10; word "conflict" written out; block 176, the word "block" is not there—well, block 176.

Mr. Dillon: The words block and lot follow through the book. It shows that the lot is 10 and the block 176, east. division of the city of Denver, Arapahoe county, Colorado, filed upon by said Charles G. Chever in filing number 829.

Mr. Marsh: We will object as immaterial.

The Court: The objection is overruled.

Mr. Marsh: We will save the exception. We object on account of its immateriality.

The Court: Well, perhaps it may be material.

Mr. Dillon: I next offer in evidence, if your honor please, share number 11 of the Denver Town Company, showing the ownership of Folsom Dorsett to lot 10, block 176, being the lot in question.

Mr. Marsh: I object because it is incompetent evidence in any contingency.

The Court: Well, I will sustain the objection to that.

Mr. Horner: There is no objection to it on account of its being a copy.

Mr. Dillon: Will your honor allow me to explain this class of testimony that I am now proceeding with? Perhaps we can dispose of it in a word. You will remember by this act of 1872, any man showing a perfect title from the town company could go before the probate judge and show that fact and get a probate deed. Now, the Denver Town Company kept a book, which they entitled a block book of the Denver Town Company. A number of settlers settled upon this land and each one had his lots assigned to him. Mr.
Dorsett was here, and among the lots which he owned was
54 this lot 10, block 176, according to the survey of E. D. Boyd
in 1859.

The Court: You expect to connect this with other testimony, giving it the force of a conveyance?

Mr. Dillon: The only connection which I can make is this: By bringing the recorder here, and Mr. Horner will undoubtedly admit the fact that this is the only conveyance that the Denver Town Company ever made to anybody. They enter their names in this book, a block book, and it became their muniment of title, and the origin of the title from the Denver Town Company, and I propose to follow that up by introducing a deed from Dorsett and a regular chain of conveyances from him to the plaintiffs. I want to show a compliance with the act of 1872.

The Court: Well, perhaps I ought, for the sake of uniformity, to make the same ruling that I did on the filings. I think a deed made by a person having the title *prima facie* conveys the title, and the deeds are not for all time burdened with this proof. I think I will allow it to go in unless the defendant can suggest some other objection than that it is immaterial.

Mr. MARSH: Incompetency.

The COURT: It don't purport to be a conveyance alone, but perhaps with other evidence it might. The objection will be overruled; the evidence may go in.

Mr. HORNER: We will reserve an exception.

The paper here admitted in evidence was marked Exhibit "G," and is in words and figures following, to wit:

TERRITORY OF COLORADO, }
County of Arapahoe, } *ss:*

I hereby certify that share No. 11 in the original city town company is recorded in Book A, on page 57, of the records in my office as the property of F. Dorsett, and contains, among other lots, lot 10, in block 176.

Witness my hand and official seal this 10th day of March, 1876.

[SEAL.] WILBUR C. LOTHROP,
Clerk and Recorder.

55 Endorsed as follows:
Copy of share No. 11 to F. Dorsett.

Mr. DILLON: Shall I produce testimony for the purpose of showing that this is the only form of conveyance adopted by the Denver Town Company to the occupants of lots or shall I bring witnesses here?

Mr. MARSH: I don't recognize the Denver Town Company as having any interest in this business at all, any more than Mrs. Grundy.

The COURT: No; but if anybody making a conveyance purported to have title to the lot it gives color; it is not claimed that it gives title.

Mr. DILLON: No; I don't claim that it gives title. The Supreme Court has expressly held that the Denver Town Company did not hold title.

Mr. HORNER: We make no objection, because I don't know; but if you say that is the only form of conveyance, and are satisfied with it, we shall not controvert it; we shall not bring any evidence to controvert it at all.

Mr. DILLON: Very well.

The COURT: If you have a deed conveying the interest *prima facie* it conveys the title.

Mr. DILLON: I call Mr. Miers Fisher.

MIERS FISHER called as a witness and sworn for the plaintiff:

(By Mr. DILLON:)

Q. Mr. Fisher, when did you come to Colorado, and when did you first become acquainted with the town site known as the city of Denver?

A. In the spring of 1860.

Q. Were you acquainted with a gentleman by the name of Fulsom Dorsett?

A. I was.

Q. Were you also acquainted with a gentleman commonly called Fulsom Dorsett, Junior?

A. I was.

56 Q. Are you able to state whether those persons were one and the same person?

A. They were as far as I know. I used to call him both. I have seen papers signed both ways.

Q. Were you acquainted with the occupants of the Denver town site at that early time?

A. I may have been acquainted with them; probably was. I don't recollect now who they were. I know everybody here at that time.

Q. Was there any occupant of a lot in this town site by the name of Fulsom Dorsett?

A. There was.

Q. Was it the same person who was also known by the name of Fulsom Dorsett, Junior?

A. It was.

Q. I will ask you to look at this paper which I offer in evidence, entitled a deed from Fulson Dorsett, Junior, to Rudolph R. Dorsett, dated the 25th of July, 1861, and whether the grantor in that deed named is the same person mentioned in Exhibit "G" Junior as Fulsom Dorsett (showing witness Exhibit G).

Mr. Marsh: I object to this question, your honor. He can't state from a certified copy whether the persons were the same or not.

The Court: The objection is sustained. I think he has gone as far as he can; that there was a person here known by Dorsett as well as by Dorsett, Junior. You can't by these certified copies state whether they were the same person or not.

Cross-examination.

(By Mr. Marsh:)

Q. What do you mean by occupant?

A. I did not use the word. That is the word used by Mr. Dillon; he is the person to explain it.

Q. The answer is there was an occupant?

A. That is what I understood.

Q. What do you mean by "an occupant"?

57 A. I understood it to be a person who was interested in the town site at that time and lived there.

Q. Whether he lived on the lot or had improvements on the lot?

A. That is something that did not enter into my calculation at all. He was here as a resident, and lived here for some time, and was acknowledged by everybody to be a resident and occupant.

Q. Where did he live when he was here—Dorsett?

A. He lived here on the town site.

Q. Whereabouts?

A. I can't recollect now; it is too long ago; it is about twenty-two years since that occurred; I can't recollect where he lived.

Q. You don't pretend to say that Dorsett occupied the lot in controversy in this case?

A. I don't remember that, sir.

Q. You don't pretend to say that he had any improvements on the lot in controversy in this case?

A. I know nothing of that; no.

Q. You do mean to say simply that he was recognized as one owner of shares in the town-site company here?

A. That is what I mean; yes, sir. He lived here and was a representative, as I understood—an occupant.

I offer in evidence a deed from Fulsom Dorsett, Junior, to Rudolph R. Dorsett, dated the 25th day of July, 1881.

Mr. Marsh: We have no objections to urge to this.

The paper here offered in evidence was marked Exhibit "H," and is in words and figures following, to wit:

Deed.

Fulsom Dorsett Jr.
to
Rudolph R. Dorsett.

Colorado Territory
County of Arapahoe. } *ss*

Know all men by these presents that I, Folsom Dorsett Jr of Denver city, county and Territory aforesaid have this day for the
consideration of three thousand dollars, the receipt whereof
58 in full is hereby acknowledged, bargained, granted, sold, released and quitclaimed unto Rudolph R. Dorsett, the following-described property or plat of grounds, to wit:

L. 11 & 12 B. 329; L. 29 & 30 B. 314; L. 19 & 20 B. 325; L. 5 & 6 B. 312; L. 23 & 24 B. 302; L. 25 & 26 B. 203; L. 9 & 10, B. 304; L. 27 & 28 B. 276; L. 29 & 30 B. 286; L. 13 & 14 B. 282; L. 5 & 6 B. 83; L. 5 & 6 B. 274; L. 11 & 12 B. 218; L. 19 & 20 B. 137; L. 25 & 26 B. 59; L. 25 & 26 B. 276; L. 3 & 4 B. 209; L. 7 & 8 B. 146; L. 10 B. 65; L. 13 & 14 B. 261; L. 21 & 22 B. 201; L. 11 & 12 B. 135; L. 27 & 28 B. 56; L. 7 & 8 B. 270; L. 5 & 6 B. 187; L. 25 & 26 B. 172; L. 29 & 30 B. 35; L. 27 & 28 B. 242; L. 7 & 8 B. 196; L. 13 & 14 B. 124; L. 4 B. 39; L. 11 & 12 B. 250; L. 29 & 30 B. 169; L. 5 & 6 B. 133; L. 5 & 6 B. 28; L. 3 & 4 B. 240; L. 5 & 6 B. 183; L. 23 & 24 B. 110; L. 29 & 30 B. 10; L. 29 & 30 B. 233; L. 10 B 176; L. 11 & 12 B. 110; L. 9 B. 96; L. 5 & 6 B. 223; L. 23

& 24 B. 166; L. 22 B. 94; L. 19 & 20 B. 76; L. 9 & 10. B. 230; L. 11 & 12 B. 152; L. 7 & 8 B. 87; L. 21 & 22 B. 69; L. 9, 10 & 11 B. 237; L. 3 & 4 B. 160; L. 23 & 24 B. 80; L. 15 & 16 B. 336; L. 1 & 2 B. 180; L. 1 & 2 B. 317; L. 15 & 16 B. 300; L. 1 & 2 B. 283; L. 15 & 16 B. 260; L. 17 & 18 B. 100; L. 1 & 2 B. 249; L. 15 & 16 B. 223; L. 1 & 2 B. 216; L. 15 & 16 B. 189; L. 15 & 16 B. 155; L. 1 & 2 B. 140; L. 15 & 16 B. 129; L. 1 & 2 B. 85; L. 31 & 32 B. 55; L. 15 & *L*6 B. 27; together with all improvements on said property in Denver city, east division, being situate in Arapahoe county, Colorado Territory, unto him, the said Rudolph R. Dorsett, his heirs and assigns, to have and to hold the above-described property with all and singular the improvements thereto belonging or in anywise incident.

In testimony whereof, I have hereunto affixed my hand this twenty-first day of July A. D. 1861.

F. DORSETT JR. [SEAL.]

Signed in the presence of—
CHARLES G. CHEVER,
RICHARD E. COOK.

59 Filed for record at 10½ o'clock a. m. August 3rd, A. D. 1861.

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I hereby certify that the above and foregoing is a true and correct copy from the records in my office, as the same appears in Book H, on page 431.

Witness my hand and official seal this 10th day of March, 1876.

[SEAL.] WILBUR C. LOTHROP,
Clerk and Recorder.

Endorsed as follows: Deed. Folsom Dorsett, Jr., to Rudolph R. Dorsett. "D."

STATE OF COLORADO, } ss:
County of Arapahoe, }

In the matter of the proof of execution of a certain conveyance from Folsom Dorsett, Junior, to Rudolph R. Dorsett, dated July 25th, 1861, and recorded in Book H, on page 431, in the office of the clerk and recorder of said county.

Be it remembered that on this seventeenth day of August, A. D. 1881, before me, the undersigned, a notary public, duly authorized by law to take acknowledgement of deeds in manner following, personally appeared Charles G. Chever, of lawful age, a competent and credible witness, who, being first duly sworn and examined by me, upon oath deposes and says—

That he has been acquainted with both the grantor and grantee in said deed mentioned since the year 1859, and is the owner in fee

simple of lot ten (10), in block one hundred and seventy-six (176), in the east division of the city of Denver, county and State aforesaid, mentioned in the said deed, and that he desires to prove the execution of the said deed as a subscribing witness thereto; and the said witness, Charles G. Chever, further says that the certified copy of said deed of conveyance, hereto attached and marked Exhibit "D," is a true, full, and correct copy of the original deed recorded as aforesaid in the office of the clerk and recorder of said
60 county; that he drafted the said original deed at the request
of the said Folsom Dorsett, Junior; that he saw the said Folsom Dorsett, Junior, sign, seal, and deliver the said deed of conveyance and in the presence and with the consent of the said Folsom Dorsett, Junior, and at the request of said grantor and with one Richard E. Cook, now deceased, subscribed his name to the said deed of conveyance in attestation thereof as a subscribing witness, and that after the execution thereof the said deed of conveyance was delivered to the said grantee, Rudolph R. Dorsett, by the said Folsom Dorsett, Junior.

The said witness further says that the original of the said deed is now lost and cannot be found, and is not now in the possession nor in the power of this affiant to produce; that after the execution and delivery thereof the said original deed was filed for record in the office of the said clerk and recorder on the third day of August, A. D. 1861, at which time this witness was the deputy clerk and recorder of said county; that in the course of his duties as such deputy he compared said original deed with the record thereof, of which the said exhibit is a certified copy, and from such examination knows that the said exhibit is a full, true, and exact copy of the said original deed; that after the record thereof the said original was delivered to the said grantee, since which time this affiant has never seen it; that afterwards and in the year A. D. 1863 the said Rudolph R. Dorsett departed from the then Territory, now State, of Colorado for Montana Territory, and has never since returned; that this witness has made diligent enquiry among his friends and acquaintances to ascertain his whereabouts, and from such enquiry has ascertained that the said Rudolph R. Dorsett was killed in the said Territory of Montana in the year A. D. 1864; and further saith not.

CHARLES G. CHEVER.

Subscribed and sworn to before me this 17th day of August, A. D. 1881.

61 [NOTARIAL SEAL.] JOHN H. CLARK,
Notary Public, Arapahoe County, Colorado.

STATE OF COLORADO,
County of Arapahoe, } *ss:*

I, John H. Clark, a notary public within and for the county of Arapahoe, in the State aforesaid, do hereby certify that Charles G. Chever, personally known to me to be the person whose name is subscribed to the foregoing affidavit and as a subscribing witness to the foregoing deed of conveyance, appeared before me this day in person, and, having been first duly sworn and examined by me, his testimony was reduced to writing, as appears in and by said affidavit; and it appearing from said examination that the said Charles G. Cheever was a subscribing witness to the said deed of conveyance and saw the said Folsom Dorsett, Junior, sign, seal, and deliver the same as his free and voluntary act and deed, and that said witness, Charles G. Cheever, subscribed said original deed, in attestation thereof, in the presence and with the consent of the said Folsom Dorsett, Junior, who executed the said deed therefor, by virtue of the authority reposed in me by law and of the statutes in such case made and provided, I do hereby certify and attest that the execution of the said deed by the said Folsom Dorsett, Junior, has been duly proved before me to be the free and voluntary act and deed of the said Folsom Dorsett, Junior.

And I do further certify that the said Charles G. Cheever was lawfully sworn and examined by me, and that his testimony was by me reduced to writing and subscribed in my presence and is fully contained and set forth in the said affidavit.

In witness whereof I have hereunto set my hand and notarial seal, at Denver, in said county, this eighteenth day of August, A. D. 1881.

[NOTARIAL SEAL.] JOHN H. CLARK,
Notary Public, Arapahoe County, Colorado.

Endorsed as follows:

Deed. Folsom Dorsett, Jr., to Rudolph Dorsett. Filed
62 Sept. 1, 1881. . R. W. Steele, clerk. State of Colorado, county
of Arapahoe, *ss:* I hereby certify that this instrument was filed for record in my office 2¼ o'clock p. m. Aug. 19th, 1881, and is duly recorded in Book 134, page 405. W. C. Lothrop, recorder. 2.75. Charles & Dillon, attorney-at-law, Denver, Colorado.

Mr. DILLON: I next offer deed from Rudolph R. Dorsett to Folsom Dorsett, Junior, dated the 20th day of March, 1863, the original deed.

The paper here introduced was marked Exhibit "I," and is in words and figures following, to wit:

Two $1 revenue stamps attached here.

This indenture made this twentieth day of March in the year of our Lord one thousand eight hundred and sixty-three between Rudolph R. Dorsett of the city of Denver, county of Arapahoe and Territory of Colorado party of the first part, and Folsom Dorsett Jr. party of the second part, witnesseth: That the said party of the first part, for and in consideration of two thousand dollars, in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of the second part forever released and discharged therefrom has remised, released, sold conveyed and quitclaimed, and by these presents does remise, sell release, convey and quitclaim unto the said party of the second part his heirs and assigns forever all the right, title, interest, claim and demand which the said party of the first part has in and to the following-described lots, pieces or parcels of land to wit:

Lots.	Blocks.	Lots.	Bl'k.	Lot.	Bl'k.	Lot.	Bl'k.	Lot.	Bl'k.
11 & 12	329	29 & 30	314	19 & 20	325	23 & 24	302	25 & 26	293
9 & 10	304	27 & 28	276	29 & 30	286	5 & 6	312	5 & 6	83
11 & 12	218	19 & 20	137	25 & 26	59	13 & 14	282	3 & 4	209
10	65	13 & 14	261	21 & 22	201	25 & 26	267	27 & 28	56
5 & 6	187	25 & 26	127	29 & 30	35	11 & 12	135	7 & 8	196
4	39	11 & 12	250	29 & 30	169	27 & 28	252	5 & 6	28
63									
5 & 6	183	23 & 24	110	29 & 30	10	5 & 6	133	10	176
9	96	5 & 6	233	23 & 24	166	29 & 30	233	19 & 20	76
11 & 12	152	7 & 8	87	22	69	22	94	3 & 4	160
15 & 16	336	1 & 2	180	1 & 2	317	9,10 & 11	237	1 & 2	283
17 & 18	100	1 & 2	249	15 & 16	223	15 & 16	300	15 & 16	189
1 & 2	140	15 & 16	129	1 & 2	85	1 & 2	216	15 & 16	27
7 & 8	146	7 & 8	270	13 & 14	124	31 & 32	55	5 & 6	274
9 & 10	123	23 & 24	80	15 & 16	260	3 & 4	240	11 & 12	110
						15 & 16	155		

all in the city of Denver, east division, county of Arapahoe and Territory of Colorado; to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part hereunto set his hand and seal, the day first above written.

RUDOLPH R. DORSETT. [SEAL.]

Ten-cent revenue stamp here attached.

Signed, sealed, and delivered in presence of—
OMER O. KENT.

TERRITORY OF COLORADO, }
Arapahoe County, } *ss:*

I, Omer O. Kent, notary public in and for the said county and Territory aforesaid, do hereby certify that Rudolph R. Dorsett, personally known to me as the same person whose name is subscribed to the within instrument of writing, appeared before me this day in person and acknowledged he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal this twentieth day of March, A. D. 1863.

[NOTARIAL SEAL.] OMER O. KENT,
Notary Public.

64 Endorsed as follows:

Quitclaim deed. Rudolph R. Dorsett to Fulsom Dorsett, Jr. Territory of Colorado, county of Arapahoe, *ss.* This instrument was filed for record on the twenty-first day of March, 11 o'clock a. m., A. D. 1863, and duly recorded in Book 3 of —, at — 90. Chas. G. Chever, cl'k & recorder. Filed Aug. 17, 1881. R. W. Steele, clerk.

Mr. DILLON: I next offer in evidence a power of attorney from Folsom Dorsett, Junior, to Charles G. Chever after the 15th day of May, 1863.

The paper here offered in evidence was marked Exhibit "J," and is in the words and figures following, to wit:

Know all men by these presents that I, Folsom Dorsett, Jr., of the city of Chicago and the county of Cook and State of Illinois, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Charles G. Chever, of Denver City, in the Territory of Colorado, true and lawful attorney for me and in my name, place, and stead to enter into the possession and take charge of all the real estate and personal property I may have belonging to me or in which I may be in anywise interested in, situated and being in the Territory of Colorado, and to sell and dispose of the said real and personal estate for such price or prices as to him, my said attorney, may seem meet and fit, and to give proper deeds of conveyance for the same, or to lease said property on such terms as he, my said attorney, may deem advisable, and to give proper acquittances and discharges for the monies arising from the sale or lease of said real estate, and to represent my interests fully in relation to any property of whatever kind or nature I may be possessed of or in which I may have any interest in said Territory of Colorado, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purposes as I might or could do it
65 if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof I have hereunto set my hand and seal the fifteenth day of May, one thousand eight hundred and sixty-three.

F. DORSETT, JR. [SEAL.]

Sealed and delivered in presence—
P. A. HOYNE,
W. FLEEGER.

STATE OF ILLINOIS, }
City of Chicago, Cook County, } *ss:*

On the fifteenth day of May, eighteen hundred and sixty-three, before me, Philip A. Hoyne, a commissioner of deeds, and of the

Territory of Colorado, residing in the county of Cook, in the State of Illinois, appeared Folsom Dorsett, Jr., personally known to me to be the real person whose name is subscribed to the foregoing power of attorney as having executed the same, and then acknowledged the execution thereof as his free act and deed.

Given under my hand and seal.

[SEAL.] PHILIP A. HOYNE,
Commissioner of Deeds and of the Territory
of Colorado, Chicago, Ill.

Endorsed as follows:

Power of attorney. Folsom Dorsett, Jr., to Charles G. Cheever. Dated May 15th, 1863. Filed for record June 23rd, 1863, 12 o'clock m. Recorded in Book B, p. 126–'7. Chas. G. Chever, cl'k & recorder Arapahoe Co., Colo. Terr't. Filed Aug. 17, 1881. R. W. Steele, clerk.

We also offer in evidence a deed from Folsom Dorsett, Jr., by Charles G. Cheever as attorney-in-fact, to Emile Berard, dated the 23rd day of December, 1864.

The paper here offered in evidence was marked Exhibit "K," and is in the words and figures following, to wit:

This deed, made this 23rd day of December in the year of our Lord one thousand eight hundred and sixty-four between Folsom Dorsett, Jr. by his attorney-in-fact, Charles G. Chever of Denver of the county of Arapahoe and Territory of Colorado, of the
66 first part and Emile H. L. Bérard of same place of the county of Arapahoe and Territory of Colorado of the second part; witnesseth, that the said party of the first part, for and in consideration of the sum of three hundred ($300) dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged has remised, released, sold, conveyed and quitclaimed, and by these presents doth remise, sell convey and quitclaim unto the said party of the second part, his heirs and assigns forever, all the right, title interest claim and demand, which the said party of the first part has in and to the following described lot or parcels of land, situate, lying and being in the county of Arapahoe and Territory of Colorado to wit: Lots No. (29 & 30) twenty-nine and thirty in block No. ten (10) fifteen and sixteen (15 & 16) in block twenty-seven (27); No. five and six (5 & 6) in block twenty-eight (28), No twenty-nine and thirty (29 & 30) block thirty-five (35) No. four (4) in block thirty-nine (39) No. thirty-one and thirty-two (31 & 32) in block fifty-five (55) No. twenty-three and twenty-four (23 & 24) in block eighty (80) No. seventeen and eighteen (17 & 18) in block one hundred (100) twenty-three and twenty-four (23 & 24) in block one hundred and ten (110) thirteen and fourteen (13 & 14) in block one hundred and twenty-four (124) twenty-five and twenty-six (25 & 26) in block one hundred and twenty-seven (127) fifteen and sixteen (15 & 16) in block one hundred and twenty-nine (129) five and six (5 & 6) in block one hundred and thirty-three (133) eleven and twelve (11 &

12) in block one hundred and thirty-five (135) nineteen and twenty (19 & 20) in block one hundred and thirty-seven (137) one and two (1 & 2) in block one hundred forty (140) seven and eight (7 & 8) in block one hundred forty-six (146) eleven and twelve (11 & 12) in block one hundred fifty-two (152) fifteen and sixteen (15 & 16) in block one hundred fifty-five (155) twenty-three and twenty-four (23 & 24) in block one hundred sixty-six (166) twenty-nine and thirty (29 & 30) in block one hundred and sixty-nine (169)
ten (10) in block one hundred seventy-six (176) one and
67 two (1 & 2) in block one hundred eighty (180) five and six
(5 & 6) in block one hundred eighty-three (183) three and four (3 & 4) in block two hundred nine (209) one and two (1 & 2) in block two hundred sixteen (216) eleven and twelve (11 & 12) in block two hundred and eighteen (218) five and six (5 & 6) in block two hundred twenty-three (223), nine, ten and eleven (9, 10 & 11) in block two hundred thirty-seven (237) three and four (3 & 4) in block two hundred and forty (240) twenty-seven and twenty-eight (27 & 28) in block two hundred and forty-two (242) one and two (1 & 2) in block two hundred and forty-nine (249) eleven and twelve (11 & 12) in block two hundred fifty (250) fifteen and sixteen (15 & 16) in block two hundred sixty (260) thirteen and fourteen (13 & 14) in block two hundred sixty-one (261) seven & eight (7 & 8) in block two hundred seventy (270) five and six (5 & 6) in block two hundred seventy four (274) twenty-seven and twenty-eight (27 & 28) in block two hundred seventy-six (276) seven and eight (7 & 8) in block one hundred ninety-six, all situate in the east division of Denver city, as per survey of E. D. Boyd, to have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining; and all the estate, right, title, interest, and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part his heirs and assigns forever.

In witness whereof the said party of the first part by his attorney-in-fact, has hereunto set his hand and seal the day and year first above written.

FOLSOM DORSETT Jr. [SEAL.]
By his att'y-in-fact CHAS. G. CHEVER. [SEAL.]

Signed, sealed and delivered in presence of—
W. W. RAMEYD.

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I, Webster D. Anthony, a notary public in and for said county,
in the Territory aforesaid, do hereby certify that Charles G.
68 Cheever, attorney-in-fact for Folsom Dorsett, Jr., personally
known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he as such attorney-in-fact signed, sealed, and delivered

the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-third day of December, A. D. 1864.

[NOTARIAL SEAL.] W. D. ANTHONY,
Notary Public.

Endorsed as follows:

Quitclaim deed. Folsom Dorsett, Jr., to Emile H. L. Barard. Territory of Colorado, county of Arapahoe, *ss.* This deed was filed for record at 9 o'clock a. m. January 6th, 1865, and duly recorded in Book 5, page 433, No. —. Chas. G. Chever, recorder & cl'k. No. —. Fees, $2.00. Filed Aug. 17, 1881. R. W. Steele, clerk.

Mr. DILLON: Also a deed from Emile Bárard to Charles G. Chever, dated the 5th day of January, 1865.

Mr. HORNER: Just put down here that both these deeds were acknowledged the same day and recorded the same day—January 6th, 1865.

The paper here offered in evidence was marked Exhibit "L," and is in the words and figures following, to wit:

This deed made this fifth day of January in the year of our Lord one thousand eight hundred and sixty-five between Emile H. L. Berard of Denver city of the county of Arapahoe and Territory of Colorado, of the first part and Charles G. Chever of same place, of the county of Arapahoe and Territory of Colorado, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of three hundred dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remised, released, sold, conveyed and quitclaimed, and by these presents doth remise, sell convey and quitclaim unto the said party
69 of the second part, his heirs and assigns forever, all the right, title interest, claim and demand which the said party of the first part has in and to the following-described lots or parcels of land situate, lying and being in the county of Arapahoe and Territory of Colorado to wit:

Lots numbered twenty-nine and thirty (29 & 30) in block No. ten (10) fifteen and sixteen (15 & 16) in block twenty-seven (27) five and six (5 & 6) in block twenty-eight (28) twenty-nine and thirty (29 & 30) in block thirty-five (35) four (4) in block thirty-nine (39) thirty-one and thirty-two (31 & 32) in block fifty-five (55) twenty-three and twenty-four (23 & 24) in block eighty (80) seventeen and eighteen (17 & 18) in block one hundred (100) twenty-three and twenty-four (23 & 24) in block one hundred and ten (110) thirteen and fourteen (13 & 14) in block one hundred and thirty-four (134) twenty-five and twenty-six (25 & 26) in block one hundred twenty-seven (127), fifteen and sixteen (15 & 16) in block one hundred twenty-nine (129) five and six (5 & 6) in block one hundred thirty-three (133) eleven and twelve (11 & 12) in block one hundred thirty-five (135) nineteen and twenty (19 & 20) in block one hundred thirty-seven (137) one and two (1 & 2) in block one hundred forty (140) seven and eight (7 & 8) in block one hundred forty-six (146) eleven and twelve in block one hundred fifty-two (152) fifteen and sixteen (15 & 16) in block one hundred fifty-five (155), twenty-three and twenty-four (23 & 24) in block one hundred sixty-six (166) twenty-nine and thirty (29 & 30) in block one hundred sixty-nine (169) ten (10) in block one hundred seventy-six (176) one and two (1 & 2) in block one hundred eighty (180) five and six (5 & 6) in block one hundred eighty-three (183) three and four (3 & 4) in block two hundred nine (209) one and two (1 & 2) in block two hundred sixteen (216) eleven and twelve (11 & 12) in block two hundred eighteen (218) five and six (5 & 6) in block two hundred twenty-three (223), nine, ten and eleven (9, 10 & 11) in block two hundred thirty-seven (237) three and four (3 & 4) in block two hundred forty (240) twenty seven twenty-eight (27 & 28) in block two hundred forty-two (242) one and two (1 & 2) in block two hundred 70 forty-nine (249) eleven and twelve (11 & 12) in block two hundred fifty (250) fifteen and sixteen in block two hundred sixty (260) thirteen and fourteen (13 & 14) in block two hundred sixty-one (261) seven and eight (7 & 8) in block two hundred seventy (270) five and six (5 & 6) in block two hundred seventy-four (274) twenty-seven and twenty-eight (27 & 28) in block two hundred seventy-six (276) seven and eight (7 & 8) in block one hundred ninety-six (196) all situate in the east division of Denver city as per survey of E. D. Boyd; to have and to hold the same together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever, of the said party of the first part either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

EMILE H. L. BERARD. [SEAL.]

Signed, sealed and delivered in presence of—
ANDY M. STANBURY.

TERRITORY OF COLORADO, }
County of Arapahoe, } *ss:*

I, Webster D. Anthony, a notary public in and for said county, in the Territory aforesaid, do hereby certify that Emile H. L. Berard, personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth. Given under my hand and notarial seal this 5th day of January, A. D. 1865.

[NOTARIAL SEAL.]

W. D. ANTHONY,
Notary Public.

Endorsed as follows:

Quitclaim deed. Emile H. L. Berard to Chas. G. Chever, Territory of Colorado, county of Arapahoe. This deed was filed for record at 9 o'c. a. m., January 6th, 1865, and duly recorded in Book 5,
page 435, No. —. Chas. G. Chever, recorder Arapahoe Co
71 No.—. Fees, $2.00. Filed Aug. 17, 1881. R. W. Steele, clerk.

Mr. Dillon: I now offer deed from William C. Kingsley, probate judge of Arapahoe county, Colorado, to Charles G. Chever, dated the 8th of May, 1875.

Mr. Marsh: We object to this as immaterial. Our objections to it will appear in the discussion hereafter. We will enter the formal objection now and the court can pass upon it hereafter when we come to discuss the merits of the case. The objection is that it is immaterial, it is void, no proper foundation is laid for it, and it is incompetent and could not convey the title.

The Court: I hold that these deeds are admitted, unless there is something on the face of them that makes them void. The objection is overruled.

Mr. Horner: We will save an exception to the ruling of the court.

The paper here admitted in evidence was marked Exhibit "M," and is in the words and figures following, to wit:

This indenture made this seventh day of May A. D. eighteen hundred and seventy-five, by and between William C. Kingsley, probate judge of Arapahoe county, Colorado Territory, party of the first part and Charles G. Chever of Denver, of the county of Arapahoe, party of the second part, witnesseth,

That whereas, by an act of Congress entitled "An act for the relief of the city of Denver, in the Territory of Colorado," approved May 28th 1864, the probate judge of said county of Arapahoe, was authorized to enter section number thirty-three (33) and the west half of section thirty-four (34) in township number three (3) south of range number sixty-eight (68) west of the sixth principal meridian, in trust, as in said act provided, and whereas James Hall, late probate
judge of said Arapahoe county did enter said land at the
72 land office in Denver city, in said county and Territory, and
whereas the said James Hall did by his deed bearing date the sixteenth day of March A. D. 1867, recorded in Book 16 page 1 of Arapahoe county records convey to Omer O. Kent the then probate judge, and successor in office to said Hall, all portions and lots of land not theretofore conveyed by said Hall in accordance with said trust, for the more effectually carrying out the trust secured in said act of Congress; and whereas the said Omer O. Kent, did at the expiration of his term of office by deed bearing date the thirty-first day of August A. D. 1867, recorded in Book 14, page 215 Arapahoe county records, convey to Jacob Downing, his successor in office, all the above-described land, save and except the executed portion of said trust, and whereas the said Jacob Downing did at the expiration of his term of office by deed recorded in Book 23, page 512

Arapahoe county records, and bearing date the twenty-third day of September A. D. 1869 convey to Henry A. Clough, his successor in office, all the above-described lands, save and except the executed portion of said trust and whereas the said Henry A. Clough did at the expiration of his term of office, by deed bearing date the twenty-second day of September A. D. eighteen hundred and seventy-three, recorded in Book 49 page 440 Arapahoe county records, convey to William C. Kingsley, his successor in office all the above-described lands, save and except the executed portion of the said trust; and whereas the said William C. Kingsley has been elected and qualified to the office of and is now the probate judge of said county; and whereas the said James Hall after the entry of the land above described as aforesaid gave public notice thereof by posting notices in three public places in said city and also by publishing a notice thereof in the Weekly Rocky Mountain News, a newspaper printed and published in said county of Arapahoe, the first publication thereof being on the 10th day of May A. D. 1865 of the entry of said land in trust as aforesaid, requiring each and every person, association or corporation of persons claiming to be an occupant or occupants, or
73 to have possession, or to be entitled to the occupancy or possession of such land or to any lot, block share or parcel thereof, to file with the probate judge of said county of Arapahoe their written statement or claim in the particular parcel or parts of land to which they claimed to have an interest or to be entitled within the limits aforesaid, within ninety days after the first publication of such notice as aforesaid, in accordance with the statute in such case made and provided; and whereas it is not disclosed by the records now existing in the office of the probate judge of Arapahoe county, Colorado Territory, that the party of the second — or his assigns or grantors did make and file any such statement or claim in writing to lots numbered twenty-three (23) and twenty-four (24) in block numbered one hundred and sixty-six (166) in the east division of the city of Denver in said county within the ninety days after the first publication of the notice by said Hall as probate judge aforesaid, but that said second party did file such statement or claim in writing to lot numbered ten (10) in block numbered one hundred and seventy-six (176) hereinafter described, within the ninety days aforesaid; and whereas it has been made to appear to said William C. Kingsley, probate judge as aforesaid, that notwithstanding the said party of the second part failed to make and file his statement and claim in writing to the said lots numbered twenty-three (23) and twenty-four (24) in block numbered one hundred and sixty-six (166) hereinafter mentioned and notwithstanding said Chever did file said statement for said lot ten as aforesaid, that Jacob Downing then probate judge of said county on the fifth (5th) day of November A. D. 1867, deeded said lots numbered twenty-three (23) and twenty-four (24) in block numbered one hundred and sixty-six (166) to John Hughes, and also deeded said lot numbered ten (10) in block numbered one hundred and seventy-six (176) on the twenty-fourth day of October A. D. 1867, to the said John Hughes who does not appear by record to have had title to said lots by hav-

ing a proper claim of title from the Denver Town Company,
74 and whereas it appears to said party of the first part that Charles G. Chever is the owner of said lots, holding the same by proper chain of title under and from the Denver Town Company, and is the rightful owner thereof under and by virtue of section nine (9) of an act of the Legislative Assembly of Colorado Territory entitled "An act to provide for the further execution of the trust relating to the townsite of the city of Denver, and to regulate the same" approved February the 8th A. D. 1872.

Now therefore, in consideration of the premises aforesaid, and of the sum of one dollar to me in hand paid, and in pursuance of the provisions of said act of the Legislative Assembly of Colorado Territory, and at the request and instance of the said party of the second part, I, the said William C. Kingsley probate judge as aforesaid, party of the first part, do hereby grant and convey unto the said Charles G. Chever, party of the second part, the following-described lots, pieces and parcels of ground, being a portion of that first above described to wit:—

Lots numbered twenty-three (23) and twenty-four (24) in block numbered one hundred and sixty-six (166) and lot numbered ten (10) in block numbered one hundred and seventy-six (176) in the east division of Denver, county of Arapahoe and Territory aforesaid, to have and to hold the above-described premises unto the said Charles G. Chever, party of the second part, his heirs and assigns forever.

In testimony whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

WILLIAM C. KINGSLEY, [SEAL.]
Probate Judge.

TERRITORY OF COLORADO, }
Arapahoe County, } *ss:*

I, James F. Watson, a notary public in and for said county, in the Territory aforesaid, do hereby certify that William C. Kingsley, probate judge of said county, to me personally known as the
75 person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and executed the foregoing instrument in writing as his free and voluntary act and deed for the uses and purposes therein set forth.

Given under my hand and official seal this eighth day of May, A. D. 1875.

[SEAL.] JAMES F. WATSON,
Notary Public.

Endorsed as follows:

Probate judge's deed. Wm. C. Kingsley to Charles G. Chever. Filed for record May 8th, 1875, at 2¾ o'clock p. m. and recorded in Book 76 of Arapahoe county records, on page 172. W. D. Anthony, recorder. 2.75, p'd. Filed Aug. 17, 1881. R. W. Steele, clerk.

R. H. McMann called as a witness and sworn for the plaintiff.

(By Mr. Dillon:)

Q. Mr. McMann, are you acquainted with lot ten, in block 176, in the East Division of the city of Denver?

A. I am.

Q. How long have you resided in the city of Denver?

A. Since February, 1876.

Q. What has been your business since that time?

A. Insurance and loaning money and real estate.

Q. What experience have you had in real estate as to being acquainted with its market value in this city and with the market value of the rents to be derived from the lots of this kind in this city?

A. Well, I have been in the business since that—well, say actively since the first of August, 1876, both selling and buying and renting property.

Q. Are you able to state what that lot is worth in rental value since the first day of March, 1879?

A. Do I understand that you mean the property?

Q. The rental value of lot ten, in block 176—that is, of the entire property, with the improvements thereon.

A. I should say $25 a month.

76 Cross-examination:

(By Mr. Marsh:)

Q. What would it be without the improvements?

A. Well, that would depend a little upon——

Q. Suppose it was vacant?

A. That would depend a little on circumstances. I have lots rented——

Q. No matter what you have. What would it be without the improvements?

A. That would depend altogether on what kind of an agreement could be effected.

Q. What would it be worth per year without any improvements?

A. Well, I haven't any doubt at all as to my ability to have realized from the naked lot alone ten dollars a month.

Q. What would the rental of it be without improvements and the tenant to pay the taxed?

Mr. Dillon: I will object to that as not cross-examination.

The Court: No; I should not think that was cross-examination. I think I will sustain the objection as not being cross-examination.

Q. Are there not a great many lots in the city not producing any rent equally well located?

A. Well, not a great many. If I would be allowed to answer in my own way I would say I have lots——

Q. I don't want to know anything about your lots. I want you to answer my way.

A. Then I would say not many.

Mr. DILLON: I submit the witness has a right to answer in his own way.

The COURT: Let the examination proceed.

Mr. DILLON: The ouster is admitted.

Mr. MARSH: If it ain't denied in the pleadings, of course it is the technical ouster.

Mr. DILLON: There are some parts of the answer that might be calculated to squint that way.

The COURT: I understand you to say it is admitted.

77 Mr. MARSH: We are in possession and claim the right to it, if that amounts to an ouster.

The COURT: Ouster admitted. Defendant admits that he is in possession and claiming title.

Mr. DILLON: I offer in evidence this filing book for the purpose of showing that John Hughes never filed upon this lot in question.

Mr. MARSH: What has John Hughes got to do with this business?

Mr. DILLON: I think the whole book ought to go in, if your honor please, for the purpose of showing everything that is connected with this lot—for the purpose of showing who did file upon it and who did not. It is a matter that comes up and is intimately connected with the act of 1864 and of the act of 1872. There are various things in this book that will come up for discussion before your honor, and the whole book ought to be in evidence.

The COURT: Well, we will sustain the objection to it.

Mr. DILLON: Well, I save an exception.

Mr. DILLON: It is admitted that this lot lies within the entry made by James Hall.

Mr. HORNER: Yes, sir; that is the fact.

The COURT: Let the admission be taken down.

Mr. DILLON: We rest, if your honor please.

Mr. MARSH: We move for nonsuit, your honor, and waive these questions or some of them.

The COURT: The motion for nonsuit is denied.

Mr. MARSH: We want to be heard upon these questions as to the admissibility of this testimony up to this point.

The COURT: I think the Supreme Court have held that in the absence of any law at all a trustee holding title conveys title by a deed *prima facie* good on its face. The ruling will be adhered to, and the motion for a nonsuit is denied.

Mr. MARSH: We offer the deed of Downing to Hughes, dated October 24, 1867—deed of the property in question. Downing was probate judge at that time. 78

Mr. DILLON: This is objected to for the reasons:

1st. That the deed is incompetent.

2nd. Because no proper foundation has been laid for its introduction.

3rd. Because it is fraudulent and void under the statutes in such case made and provided.

4th. Because the grantee therein named did not file upon said lot within the ninety days provided by law, nor at all, because he was not the owner nor occupant nor *bona fide* owner of the improvements thereon.

5th. Because he was not a beneficiary under the act of Congress nor the act of the legislature of the Territory of Colorado of 1864.

The COURT: The objection is overruled.

Mr. DILLON: We reserve an exception.

The paper here received in evidence was marked Exhibit "I," and is in the words and figures following, to wit:

This indenture made this twenty fourth day of October in the year of our Lord one thousand eight hundred and sixty seven by and between Jacob Downing probate judge of Arapahoe county and Territory of Colorado, party of the first part and John Hughes, party of the second part, witnesseth: That whereas, by an act of Congress entitled "An act for the relief of the citizens of Denver in the Territory of Colorado" approved May the 28th A. D. 1864, the probate judge of the said county of Arapahoe was authorized to enter section numbered thirty-three (33) and the west half (½) of section numbered thirty-four (34) in township numbered three (3) south of range numbered sixty eight (68) west of the sixth (6) principal meridian in trust as in said act provided. And whereas James Hall, probate judge of said county hath entered said land at the land office in Denver city, And whereas the said James Hall hath by his deed dated the sixteenth (16th) day of March A. D. 1867 conveyed to the said Omer O Kent his successor in office all 79 portions and lots of land not heretofore conveyed by him in accordance with said trust for the more effectually carrying out the trust secured in said act of Congress and whereas said Omer O. Kent, did on the thirty-first day of August A. D. 1867 by his deed convey to his successor in office Jacob Downing, all portions and lots of said land not heretofore conveyed by him in accordance with said trust, for the more effectually carrying out the trust secured in said act of Congress; and whereas, the said party of the second part is justly entitled to the lots and parcels of ground hereinafter described as the rightful occupant thereof and the *bona fide* owner of the improvements thereon under the provisions of said act of Congress;

Now, therefore, in consideration of the premises and the sum of one dollar by the said party of the second part in hand paid to the said party of the first part under and by virtue of the act of Congress aforesaid, and the laws of the Territory of Colorado, the said party of the first part doth hereby grant and convey unto the said party of the second part, the following described lot and parcel of land, being a part and parcel of the tract of land herein before described to wit: Lots nineteen (19) and twenty (20) in block No. twenty-three (23) lot fourteen (14) in block seventy-three (73) lot thirty-two (32) in block No. ninety-two (92) lots thirty-one (31) and thirty-two (32) in block No. one hundred and twenty-eight (128) lot thirty-two (32) in block No. one hundred and thirty-eight (138) lot one (1) in block one hundred and sixty-two (162), lot ten (10) in block No. one hundred and seventy-six (176) lots five (5) six (6) and

twenty-nine (29) in block one hundred and ninety-six (196) lot eighteen in block No. two hundred and nine (209) lots seven (7) and eight (8) in block No. two hundred and thirty-two (232) lots eleven (11) and twelve (12) in block No. two hundred and thirty-one (231) lot eleven (11) in block No. thirty-eight (38) lots twenty-nine (29) and thirty (30) in block No. eight (8) lots fifteen (15) and sixteen (16) in block No. nine (9) lots twenty-seven (27) and twenty-eight (28) in block No. eleven (11), lot four (4) in block No.
80 twelve (12) in the east division of the city of Denver, county
of Arapahoe and Territory of Colorado; to have and to hold the above-described premises unto the said party of the second part, his heirs and assigns forever.

In testimony whereof the said party of the first part hath hereunto set his hand and seal the day and year first above written.

[Probate Court Seal.]

JACOB DOWNING, [PRIVATE SEAL.]
Probate Judge.

TERRITORY OF COLORADO, } ss:
County of Arapahoe, }

I, L. B. France, a notary public in and for the county and Territory aforesaid, do hereby certify that Jacob Downing, probate judge, personally known to me as the person whose name is subscribed to the above and foregoing deed of conveyance, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and official seal on the 24th day of October, A. D. 1867.

[NOTARIAL SEAL.]

L. B. FRANCE,
Notary Public.

Filed for record April 30th, A. D. 1869, at 10¼ o'clock a. m.

W. D. ANTHONY, *Recorder,*

STATE OF COLORADO, } ss:
County of Arapahoe, }

I, W. C. Lothrop, county clerk and recorder in and for said county, in the State aforesaid, do hereby certify that the above and foregoing is a true, correct, and complete transcript and copy from the records of my office, as the same appears in Book 16 at page 245.

Witness my hand and official seal this 3rd day of May, A. D. 1883.

[SEAL.]

WILBUR C. LOTHROP,
County Clerk and Recorder,
By CHARLES H. SCOTT, *Dp.*

81 Mr. MARSH: I offer a deed from John Hughes to John W. Horner.

Mr. DILLON: It is objected to for the reasons last stated, and for the further reason that no title appears in the grantor in this deed mentioned.

The COURT: The objection is overruled. What is the date of it?

Mr. HORNER: 26th day of November, 1870.

The paper here admitted in evidence was marked Exhibit 2, and is in the words and figures following, to wit:

This deed made this twenty-sixth day of November in the year of our Lord one thousand eight hundred and seventy between John Hughes of the county of Arapahoe and Territory of Colorado of the first part and John W. Horner of the county of Arapahoe and Territory of Colorado of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of fifteen hundred dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has remise-, released, sold conveyed and quit-claimed and by these presents does remise, sell convey and quit-claim, unto the said party of the second part his heirs and assigns forever, all the right, title, interest claim and demand which the said party of the first part has in and to the following described real estate, situate lying and being in the county of Arapahoe and Territory of Colorado, to wit:

The undivided one-half interest in and to all the following-described lots or parcels of land to wit: Lots twenty-one (21) and twenty-two (22) in block sixty-four (64) lots twenty-five (25) and twenty-six (26) in block one hundred and thirty-six (136) lots twenty-three (23) and twenty-four (24) in block one hundred and sixty-six (166) lot fourteen (14) in block seventy-three (73) lot thirty-two (32) in block ninety-two (92) lot ten (10) in block one hundred and seventy-six (176) lot twenty-nine (29) in block one hundred and ninety-six (196) lot eighteen (18) in block two hundred and nine (209) lots seven (7) and eight (8) in block two hundred and
82 thirty-two (232) lots twenty-nine (29) and thirty (30) in block
eight (8) lots twenty-seven (27) and twenty-eight (28) in block eleven (11) lots seven (7) and eight (8) in block one hundred and forty (140); lots fifteen (15) and sixteen (16) in block one hundred and ninety-three (193) and lots twenty-one (21) and twenty-two (22) in block eighty-one (81); all of said above-described real estate being situate and lying in the eastern division of the city of Denver, as per map drawn by F. J. Ebert, to have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging, or in anywise thereunto appertaining, and all the estate, right, title, interest and claim whatsoever of the said party of the first part, either in law or equity, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

JOHN HUGHES. [SEAL.]

Signed, sealed, and delivered in presence of—
E. T. JONES.

TERRITORY OF COLORADO, } *ss:*
County of Arapahoe, }

I, Edward T. Jones, a notary public in and for said county, in the Territory aforesaid, do hereby certify that John Hughes, personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this twenty-sixth day of November, A. D. 1870.

[NOTARIAL SEAL.] EDWARD T. JONES,
Notary Public.

Endorsed as follows:

Quitclaim deed. John Hughes to John W. Horner. Territory of Colorado, Arapahoe Co. This deed was filed for record at 10 o'clock a. m., Nov. 26, A. D. 1870, and duly recorded in Book 28, page No. 551. W. D. Anthony, recorder. No. —. Fees, $2¼, paid.

83 Mr. MARSH: The deed from Hughes conveys one undivided half. Here is a decree of court, conveys the other undivided half to Mr. Horner. I suggest that it be admitted to save putting in so large a paper to encumber the record.

Mr. DILLON: That better go in subject to the same objection I made to the others last above.

The plaintiff saves an exception to the introduction in evidence of this decree.

Mr. HORNER: This decree was made the 30th day of July, 1877, in the district court of Arapahoe county.

The paper here offered in evidence was marked Exhibit 3, and is in the words and figures following, to wit:

District Court, Arapahoe County.

STATE OF COLORADO, } *ss:*
County of Arapahoe, }

Pleas in the district court of the second judicial district of the State of Colorado, sitting in and for the county of Arapahoe, before the honorable Victor A. Elliott, judge of said judicial district, at a special term thereof duly appointed to be begun and holden and begun and holden at the court-house in the city of Denver, in the county of Arapahoe and State of Colorado, on the fourth Tuesday (it being the 22nd day) of March, A. D. 1877, at the hour of ten o'clock a. m.

Present: The honorable Victor A. Elliott, judge of the district court of the second judicial district of the State of Colorado; David B. Graham, Esq., district attorney of said district; David J. Cook, sheriff of said county; Robert Chalfant, clerk of said court.

Be it remembered that heretofore and on, to wit, the fourth day of April, A. D. 1877, the same being one of the regular judicial days of the special March term, A. D. 1877, of said court, the
84 following proceedings, *inter alia*, were had and entered of record in said court, to wit:

JOHN W. HORNER
vs.
CHARLES B. PATTERSON, Conservator of the Estate of John Hughes, an Insane Person; Laura F. Hughes, Elisa C. Hughes, Janet D. Hughes, Horace C. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, Amos B. Hughes, and Charles C. Hughes. } 3587.

This day came the petitioner in his own proper person and by D. J. Haynes, Esq., his solicitor, and the defendants Charles B. Patterson, as conservator of the estate of John Hughes, an insane person, Laura F. Hughes, Horace C. Hughes, and Charles C. Hughes, by J. F. Welborn, Esq., their solicitor, and the defendants Elisa C. Hughes, Janet D. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, and Amos D. Hughes, by J. F. Welborn, their guardian *ad litem;* and it appearing to the court that the defendants who are infants of tender age and appear by their guardian *ad litem* were duly served with the process of this court more than ten days prior to the commencement of the January term, A. D. 1877, of this court, and the court having appointed J. F. Welborn, Esq., guardian *ad litem* for said infant defendants, and the said defendants Charles B. Patterson, as conservator of the estate of John Hughes, an insane person as aforesaid, and Laura F. Hughes, Charles C. Hughes, and Horace C. Hughes having filed their answer to said petition, and the said J. F. Welborn, Esq., guardian *ad litem* for the defendants Elisa C. Hughes, Ganet D. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, and Amos B. Hughes, having filed an answer to said petition, and the court having heard the evidence, as well on the part of the petitioner as on the part of the said defendants, and this cause coming on to be heard upon the petition, the answer of the defendants, and the answer filed for the defendants who are infants of tender age by their guardian *ad litem*, and upon the testimony heard by the court in open court, and the court, having heard the argument of counsel and being fully advised in the premises and on consid-
85 eration thereof, doth find that on, to wit, the twenty-sixth day of November, A. D. 1870, one John Hughes, then holding the legal title to lots ten (10), in block one hundred and seventy-six (176); lots seven (7) and eight (8), in block two hundred and thirty-two (232); lots twenty-three (23) and twenty-four (24), in block one hundred and sixty-six (166); lots twenty-nine (29) and thirty (30), in block eight (8), and lots twenty-one (21) and twenty-two (22), in block eighty-one (81), in the east division of the city of Denver, in the county of Arapahoe, in the State of Colorado, conveyed by quitclaim deed the undivided one-half interest in and to all of said real estate to the petitioner, John W. Horner; that subsequently

and on, to wit, the second day of January, A. D. 1875, in order to clear up a cloud that seemed to rest on the title to lots twenty-one (21) and twenty-two (22), in block eighty-one (81), in the east division of the city of Denver, in the county of Arapahoe aforesaid, the said John Hughes and the petitioner herein paid one Lewis N. Tappan the sum of eight hundred dollars out of money belonging to them jointly, and that a deed to said lots twenty-one and twenty-two, in said block eighty-one, in consideration of the said sum of eight hundred dollars, inadvertantly and by mistake made by the said Lewis N. Tappan to the said John Hughes, instead of to the said John Hughes and John W. Horner; and the court, after the examination of the proofs presented by the said petitioner, finds that the title to the said lots twenty-one (21) and twenty two (22), in block eighty-one aforesaid, is in the said John W. Horner conjointly with the defendants, and that the deed from the said Lewis N. Tappan to said lots should have run to the said John Hughes and the said John W. Horner instead of to the said John Hughes alone; that the said defendants, the said Charles B. Patterson, as conservator of the estate of the said John Hughes, an adjudged insane person, and the said Laura T. Hughes, Charles C. Hughes, Horace C. Hughes, Elisa C. Hughes, Janet D. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, and Amos B. Hughes, derive their title to the other undivided half of the said real 86 estate, the one as conservator and the other as heirs-at-law of the said John Hughes, now adjudged an insane person; that the petitioner and the defendants are the owners in fee simple as tenants in common of said real estate.

The court doth therefore order, adjudge, and decree that the said petitioner, John W. Horner, is entitled to one-half part of the premises aforesaid in fee simple, and that the defendants aforesaid are entitled to the other one-half part of said premises in fee simple; and the court doth further order, adjudge, and decree that a partition of said premises be made; that Samuel B. Morgan, John M. Berkey, and Scott J. Anthony, neither of whom appears to be connected with any of the parties, either by consanguinity or affinity and who are entirely disinterested, be, and they are hereby, appointed commissioners to make partition of said premises. Each of said commissioners shall take an oath before the court or some justice of the peace fairly and impartially to make partition of said real estate in accordance with the judgment of the court as to the right and interests of said parties, if the same can be done consistently with the interests of the estate. The said commissioners are ordered to go upon the premises and make partition of said real estate, tenements, and heraditaments, assigning to each party his or their share by proper descriptions, and make oath under their hands and seals to the court during the next succeeding term thereof; and if said commissioners shall find that said premises are so circumstanced that a division thereof cannot be made without manifest prejudice to the proprietors of the same they will so report to the court.

And afterwards and on, to wit, the thirtieth day of July, A. D. 1877, the same being one of the regular juridical days of the April term, A. D. 1877, of said court, the following proceedings, *inter alia*, were had and entered of record in the said court, to wit:

JOHN W. HORNER
vs.
87 CHARLES B. PATTERSON, Conservator of the Estate of John Hughes, an Insane Person; Laura F. Hughes, Elisa C. Hughes, Janet D. Hughes, Horace C. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, Amos B. Hughes, and Charles C. Hughes. } 3597.

It is ordered, adjudged, and decreed by the court that the decree rendered in this cause on the fourth day of April, A. D. 1877, be, and the same is hereby, amended by striking out from the said decree the words "defendants; and that the deed from the said Lewis N. Tappan to said lots should have run to the said John Hughes and the said John W. Horner, instead of to the said John Hughes alone; that the defendants, the said Charles B. Patterson, as conservator of the estate of the said John Hughes, an alleged insane person, and the said Laura F. Hughes, Charles C. Hughes, Horace C. Hughes. Eliza C. Hughes, Janet D. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, and Amos B. Hughes, derive title to the other undivided half of said real estate, the one as conservator and the other- as heirs-at-law of the said John Hughes, now adjudged an insane person; that the petitioner and the defendants are the owners in fee simple as tenants in common of said real estate. The court doth therefore order, adjudge, and decree that the said petitioner, John W. Horner, is entitled to the one-half part of the premises aforesaid in fee simple, and that the said John Hughes is entitled to the other one-half part of said premises in fee simple," and inserting in the place of the words so stricken out from said decree the words "said John Hughes; and that the deed from said Lewis N. Tappan to said lots should have run to the said John Hughes and the said John W. Horner, instead of to the said John Hughes alone; and that the petitioner and the said John Hughes are the owners in fee simple as tenants in common of said real estate. The court doth therefore order, adjudge, and decree that the said petitioner, John W. Horner, is entitled to one-half part of the said premises aforesaid in fee simple, and that the said John Hughes is entitled to the other half part of said premises in fee simple."

88 At this day come Samuel B. Morgan, John M. Berkey, and Daniel C. Lyles, commissioners heretofore appointed by the court to make partition of the real estate in the matter of John W. Horner *vs.* Charles B. Patterson, conservator, etc., *et al.*, and are sworn by the judge, in open court, to fairly and impartially make such partition of said real estate; and the oath taken by said commissioners and severally subscribed by them is in words and figures as follows, to wit:

STATE OF COLORADO, County of Arapahoe, } *ss:*

In the District Court of the April Term, A. D. 1877.

JOHN W. HORNER
vs.
CHARLES B. PATTERSON, Conservator of the Estate of John Hughes, an Insane Person; Laura F. Hughes, Eliza C. Hughes, Janet D. Hughes, Horace C. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, Charles C. Hughes, and Amos B. Hughes. } 3587.

I do solemnly swear that I will fairly and impartially make partition of the real estate mentioned in the decree rendered by the court in the above-entitled cause in accordance with the judgment of the court as to the rights and interests of the parties, if the same can be done consistently with the interests of the estate, according to the best of my judgment, so help me God.

(Signed) SAMUEL B. MORGAN.
JOHN M. BERKEY.
DANIEL C. LYLES.

Subscribed and sworn to before me this day, the 30th day of July, A. D. 1877.

(Signed) VICTOR A. ELLIOT, *Judge.*

And afterwards, and on this same day, comes John W. Horner, Esq., in his own proper person, and presents to the court here the report of said commissioners; which is approved by the court and ordered filed and recorded, and is in the words and figures as follows, to wit:

89 STATE OF COLORADO, County of Arapahoe, } *ss:*

In the District Court of the April Term, A. D. 1877.

JOHN W. HORNER
vs.
CHARLES B. PATTERSON, Conservator of the Estate of John Hughes, an Insane Person; Laura F. Hughes, Eliza C. Hughes, Janet D. Hughes, Horace C. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, Charles C. Hughes, and Amos B. Hughes. } 3587.

The undersigned commissioners, Samuel B. Morgan and John M. Berkey, appointed by the decretal order of the court rendered in said cause on the fourth day of April, A. D. 1887, and Daniel C. Lyles, appointed by the decretal order of this court rendered in said cause on the twenty-third day of July, A. D. 1877, in place of Scott J. Anthony, who was appointed one of said commissioners by the order first aforesaid and subsequently by the court relieved from serving on said commission, to make partition of the premises in

said first decree mentioned and hereinafter described, respectfully report to the court that, after taking an oath before the Honorable Victor A. Elliott, judge of said court, fairly and impartially to make partition of said real estate in accordance with the judgment of the court as to the rights and interests of the parties, if the same could be done consistently with the interests of the estate (which oath is hereto attached and is made part of the report), they went upon the said real estate and made partition of said real estate, tenements, and hereditaments, assigning to each party his or her share—that is to say, they set off and assigned to John Hughes, who has been adjudged an insane person and of whose estate the defendant Charles B. Patterson is the conservator and who is the husband of the defendant Laura F. Hughes and the father of the defendants Eliza C. Hughes, Janet D. Hughes, Horace C. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, Amos B. Hughes, and Charles C. Hughes, as his share of said real estate, being a one-half of the same, according to the relative value thereof, the following, to wit, lot numbered twenty-two (22), in block numbered
90 eighty-one (81), and lot numbered thirty (30), in block numbered eight (8), and lots numbered seven and eight (7 & 8), in block two hundred and thirty-two (232), all in the east division of the city of Denver, in the county of Arapahoe and State of Colorado; and to the said John W. Horner lot numbered ten (10), in block numbered one hundred and seventy-six (176); lot numbered twenty-one (21), in block numbered eighty-one (81); lot numbered twenty-nine (29), in block eight (8), and lots numbered twenty-three (23) and twenty-four (24), in block one hundred and sixty-six (166), all in the east division of the city of Denver, in the county of Arapahoe and the State of Colorado.

All of which is respectfully submitted for the approval of the court.

Given under our hands and seals this 30th day of July, A. D. 1877.

(Signed) SAMUEL B. MORGAN. [SEAL.]
JOHN M. BERKEY. [SEAL.]
DANIEL C. LYLES. [SEAL.]

JOHN W. HORNER
vs.
CHARLES B. PATTERSON, Conservator of the Estate of John Hughes, an Insane Person; Laura F. Hughes, Eliza C. Hughes, Janet D. Hughes, Horace C. Hughes, John B. Hughes, Robert S. Hughes, Sallie J. Hughes, Charles C. Hughes, and Amos B. Hughes. } 3587.

This day came Samuel B. Morgan, John M. Berkey, and Daniel C. Lyles, commissioners appointed by the court to make partition of the real estate in a former decree mentioned between the parties thereto, and made report of their proceedings, and that they had made partition as in and by said decree they were requested; and the court, having examined the same, doth find that the said commissioners have in every respect proceeded according to law and the judgment of the court in said decree declared and that said partition was fairly and impartially made.

And no objections or exceptions being made by any of the parties herein thereto, *and* the court, being fully advised in the premises, doth order, adjudge, and decree that the proceedings, partition, and report of said commissioners be, and the same are hereby,
91 approved and confirmed and that the said parties hold in severalty the shares set off and assigned to each respectively by the said commissioners, and that the title to the shares set off and assigned by the said commissioners to each of said parties respectively b*y*, and the same is hereby, vested in said parties respectively according to said assignment; and it is further ordered that the report of said commissioners be spread at large upon the records of this court, and that a copy of the former decree in this cause as amended, together with a copy of the report of said commissioners and a copy of this decree, duly certified, be filed in the office of the clerk and recorder within and for the county of Arapahoe and State of Colorado.

And it is further ordered that the cost and expenses of this proceeding be paid within thirty (30) days by the parties in the following proportion, to wit: That the complainant, John W. Horner, pay one-half of said costs and expenses, and that the defendant, Charles B. Patterson, as conservator as aforesaid, pay the other half of said costs and expenses, and that in default thereof execution issue therefor.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

I, Archie C. Fisk, clerk of the district court within and for the county of Arapahoe and State aforesaid, do hereby certify that the above and foregoing is a true, correct, and complete transcript and copy of the original decree, the decree amendatory thereof, the oath of the commissioners appointed to make partition, the report of said commissioners, and the final decree made and entered of record at the dates aforesaid stated in a certain cause lately depending in said court, wherein John W. Horner was complainant and Charles B. Patterson, as conservator, etc., *et al.* were defendants, as the same now appears from the records and files now remaining in my office.

In witness whereof I have hereunto subscribed my name and the seal of said court, affixed at Denver, in said county, this
92 29th day of July, A. D. 1878.

[SEAL.] ARCHIE C. FISK, *Clerk*,
By CHAS. W. TAYLOR, *Deputy*.

Endorsed as follows:

John W. Horner *vs.* Chas. B. Patterson, conservator, etc., *et al.* Certified copy of decree, etc. State of Colorado, county of Arapahoe, *ss:* I hereby certify that this instrument was filed for record in my office at 8 o'clock a. m. July 30, 1878, and is duly recorded in Book 104, page 34. W. C. Lothrop, recorder. 5.65.

Mr. Marsh: We offer a transcript of the proceedings in a suit at Jefferson county.

Mr. Dillon: That is objected to by the plaintiff for the reason that it appears from this transcript of proceedings that there was no trial upon the merits.

Second. Because it shows that it is not an adjudication upon the title of the defendant Horner.

Third. Because it appears to be a judgment simply for costs.

Fourth. Because the parties in that suit are not the same as the parties in this suit now at bar.

Fifth. Because it does not appear that the defendant Horner was a party to that action; that his title to the lot in question was not in issue and was not tried nor determined in that case; and,

Sixth. Because the transcript offered in evidence does not show that any judgment whatever was rendered in that case.

The Court: The objections are good if true; it depends upon inspection; they are valid if well taken.

Mr. Marsh: I propose to connect this record evidence with evidence that Horner appeared not as counsel merely, but as a party in interest and conducted the suit in his own behalf.

Mr. Dillon: I make the point that he cannot dispute this record.

The Court: That is a matter that does not arise now. The objection to the introduction of the record is sustained.

93 Mr. Marsh: We take exception, your honor.

I now offer to prove by the witness J. W. Horner, who is present in court, that he is one of the parties in this case; that he was the attorney appearing and defending for the nominal defendant in the case of Chever against Bethley, named in this record; that on the bringing of that suit of Chever against Sarah Bethley Sarah Bethley was Horner's tenant, in possession of the premises in question; that on the bringing of such suit she notified Mr. Horner of the bringing of this suit by Chever against her for the possession of these premises, and thereupon and thereafter Mr. Horner in person appeared and defended that suit as and for her, and that he is the same J. W. Horner also named as attorney in that suit of Charles G. Chever against Sarah Bethley.

Mr. Dillon: The offer is objected to.

Mr. Marsh: I offer this record in view of this offer.

Mr. Dillon: I object to the offer and object to that record.

Mr. Marsh: I might be technically now, your honor, *be* compelled to reoffer this record.

The Court: Very well; this record is reoffered.

Mr. Dillon: The record itself is objected to for the reasons last stated. The offer of parol evidence in connection therewith is also objected to for the following reasons:

First. Because it does not contain an offer to prove that the defendant Horner in the Bethley case put his title in issue or offered any evidence whatever concerning his title to the lot in question.

Second. Because it does not contain an offer to show that the Bethley case was tried upon its merits.

Third. Because a correct construction of the offer shows that he only appeared in the Bethley case as an attorney and not as a party, and because the offer contains no attempt to show that the defendant Horner made himself a party to that suit.

94 The COURT: The objection to the introduction of the testimony is sustained.

Mr. MARSH: We take an exception, your honor—exceptions to the refusal to allow us to make the parol proof by the witness Horner and exceptions to the rulings of the court excluding the record of the judgment.

Mr. DILLON: I ask leave, if your honor please, to amend the prayer of the complaint so as to change the prayer for mesne profits from two hundred dollars to fifteen hundred dollars or twelve hundred dollars in accordance with the evidence in the case.

Mr. MARSH: I object, your honor, for this reason: We are taken entirely by surprise in this case. On no former hearing in this case has any such claim been made. I have not come here prepared to show what this rental was worth if they claim more than that. If they claimed anything like the testimony they have adduced here we would have come here prepared with witnesses to show it. We are here without anybody except Mr. Horner who has any knowledge of this matter. I say they ought not to be permitted to show it.

Mr. DILLON: That is just, your honor. I will withdraw it.

The COURT: The record may show that the motion to amend is withdrawn.

Mr. MARSH: That is our case, your honor.

The COURT: I have passed upon the plaintiff's *prima facie* case. The burden is with you. You may proceed.

Mr. DILLON: I have one witness in rebuttal.

The COURT: Very well. You may proceed.

ROBERT STEELE sworn as a witness for the plaintiff.

(By Mr. DILLON:)

Q. Mr. Steele, are you clerk of the county court of Arapahoe county, Colorado?

A. Yes, sir.

Q. Are you the custodian of a certain book called the book of filings, made by James Hall, probate judge of this county in 1865?

A. Yes, sir.

95 Q. Are you the custodian of the original filings made by the occupants and claimants for lots on this town site?

A. Yes, sir.

Q. I will ask you if you have made an examination of the original filings remaining in your office for the purpose of ascertaining whether there was an original filing by John Hughes upon lot ten, block one hundred and seventy-six, east division of the city of Denver?

A. Yes, sir; it was some time ago.

Q. Were you able to find that filing?

Defendant, by his counsel, objected to the question.

Mr. DILLON: The object of this proof is to show that John Hughes never filed upon this lot at all, and the clerk of the court, who has the custody of those filings, is brought here for the purpose of showing that fact, and in connection with that I propose to offer this filing book to show that there was no record of such a filing, which is the second and best evidence to be produced upon that point. I propose to show this, your honor, that in an action of ejectment I am entitled to show that the deed is fraudulent, and that if shown to be a void deed it conveys no title whatever, and that that fact may be shown in an action of ejectment. That is the proposition which I claim to be able to show.

The COURT: The objection to the evidence is sustained.

Mr. DILLON: We save an exception.

The plaintiff now offers to prove by Miers Fisher and Robert Steele and John W. Horner, witnesses who are present, that the said John Hughes, grantee mentioned in the deed from Jacob Downing, probate judge, bearing date 24th of October, 1867, never filed upon the lot in controversy within the ninety days provided by the act of the territorial legislature of Colorado in 1864 nor at all.

Second. That at the time of the issuance of the said deed of Jacob Downing, probate judge, to John Hughes there was a filing
96 upon the same lot by one J. M. Veasey which had not at that time been withdrawn.

Third. That the said John Hughes was not a beneficiary under the trust act of the Congress of the United States approved May 23, 1844, as to the lot in controversy, and was not an occupant nor entitled to the possession of the same, nor had he any improvements whatever thereon.

Mr. MARSH: To which we object, your honor.

The COURT: The objection is sustained.

Mr. DILLON: The plaintiff saves an exception.

Will your honor allow me to include in my offer another offer, in order to keep the record straight?

Mr. HORNER: It seems to me that when a man makes an offer he should have somebody to prove it by.

Mr. DILLON: I have got somebody to prove it by—everything that I have stated.

The COURT: So far as any offer by Steele is concerned, he may be presumed to be here.

Mr. DILLON: I can prove the matter by Miers Fisher also, who is within hailing distance, as to the occupancy and everything of that kind.

The COURT: You can make the offer.

Mr. DILLON: I will offer to prove by the defendant Horner himself, who is present, that on and prior to the 23rd day of May, 1873, the plaintiff was in possession of the lot in controversy in this case and had built a fence around the same, and that afterwards and on or about the 30th day of May, in the same year, the defendant Horner broke through the said fence, moved a frame house upon the said lot, took possession of it, and ousted the plaintiff therefrom.

Mr. MARSH: We object to the latter portion of it.

The COURT: When was this suit commenced?

Mr. DILLON: This suit was begun in February, 1879, it seems.

The COURT: When did you say the entry was made?

97 Mr. DILLON: The 23rd of February, 1873, or May, rather.

The COURT: You have no greater rights than you would in a bill in equity, and in a bill in equity you would be barred.

Objection sustained. Plaintiff saves an exception.

Evidence closed.

And, forasmuch as the matter- aforesaid are not of record in this court, the plaintiff brings this his bill of exceptions, and prays that the same may be signed and sealed as of the day and year first above written, which is accordingly done.

CHESTER C. CARPENTER, *Judge*. [SEAL.]

The above bill of exceptions is satisfactory to us.

CHARLES & DILLON,
Plaintiff's Attorneys.
LUCIUS P. MARSH,
Att'y for Defendant-.

Endorsed as follows:

No. 6508. District court, Arapahoe county, Colorado. Charles G. Chever *vs.* John W. Horner *et al.* Bill of exceptions. Filed June 1, 1883, as of May 3, 1883. Henry Sparnick, clerk. J. Q. Charles, H. C. Dillon, for appellant.

98 STATE OF COLORADO, } ss:
Arapahoe County, }

I, Henry Sparnick, clerk of the district court of the county of Arapahoe, State aforesaid, do hereby certify the above and foregoing to be a true, complete, and perfect transcript and copy of all papers filed and all orders of court had and entered of record in a certain cause in said court lately depending, wherein Charles G. Chever was plaintiff and Henry E. Rogers and John W. Horner were defendants, as the same now remain on file and of record in said court.

Witness my hand and the seal of said court, at Denver, county and State aforesaid, this 16 day of July, A. D. 1883.

(Signed) HENRY SPARNICK, *Clerk.*

99 In the Supreme Court of the State of Colorado.

CHARLES G. CHEVER, Appellant, *vs.* JOHN W. HORNER and HENRY E. ROGERS, Appellees.	Error to the District Court of Arapahoe County.

And now comes the said appellant, by John Q. Charles and Henry C. Dillon, his attorneys, and says—

That upon the record and proceedings of the district court aforesaid there is manifest error, in this, to wit:

I.

The court erred in finding and giving judgment from the evidence aforesaid that the defendant John W. Horner is the owner in fee simple of the property in controversy and entitled to the possession of the same. (Folio 73.)

II.

The court erred in overruling the appellant's motion for a new trial. (Folios 76, 77.)

III.

The court erred in refusing to admit in evidence on the part of the appellant the book of filings kept by the probate judge of Arapahoe county under the trust act of 1864. (Folio 216.)

IV.

The court erred in admitting in evidence on the part of the appellees a deed from Jacob Downing, probate judge, to John Hughes, dated twenty-fourth October, 1867, "Exhibit I." (Folio 218.)

V.

100 The court erred in admitting in evidence the deed from John Hughes to John W. Horner, dated twenty-sixth November, 1879, "Exhibit 2." (Folio 227.)

VI.

The court erred in admitting in evidence on the part of the appellees the decree of the district court of Arapahoe county of July 30th, 1877, marked "Exhibit 3." (Folios 234–263, inclusive.)

VII.

The court erred in refusing to admit in evidence in rebuttal on the part of the appellant the book of filings kept by the probate judge of Arapahoe county under the trust act of 1864 for the purpose of showing that the said deed from Downing to Hughes was fraudulent and void. (Folios 272–274.)

VIII.

The court erred in refusing to permit the appellant to prove in rebuttal by the witnesses Fisher, Steele, and Horner that the said

John Hughes never filed upon the lot in controversy within the ninety days provided by the trust act of 1864, nor at all.

Second. That at the time of the issuance of said deed from Downing to Hughes there were counter-filings upon said lot by appellant and one J. M. Veasey.

Third. That the said Hughes was not a beneficiary under the act of Congress of May twenty-third, 1844, and was not an occupant nor entitled to the possession of the same and had made no improvements thereon. (Folios 274–278.)

Fourth. That on and prior to the twenty-third of May, 1873, the appellant was in possession of the lot in controversy and had built a fence around the same, and that afterwards and on the thirtieth of May, 1873, the defendant Horner broke said fence and moved a frame house upon the lot, took possession of it, and ousted appellant therefrom.

101 Wherefore appellant prays judgment of this honorable court that the judgment aforesaid of the said district court of Arapahoe county be reversed, and the said — be remanded thereto for a new trial.

And for his costs in this behalf most unjustly sustained.

(Signed) JOHN Q. CHARLES,
HENRY C. DILLON,
Att'ys for Appellant.

Which said transcript of record and assignment of errors was endorsed as follows:

No. 1254. Charles G. Chever, appellant, *vs.* John W. Horner, appellee. Transcript of the record and assignment of errors. Filed in supreme court Nov. 28, 1884. James A. Miller, clerk. Henry C. Dillon, att'y for appellant.

102 And afterwards and on, to wit, December 14th, A. D. 1883, came said appellees and filed herein their joinder in error, which is in words and figures following, to wit:

STATE OF COLORADO, *ss:*

In the Supreme Court, of the December Term, A. D. 1883.

CHARLES G. CHEVER, Appellant, *vs.* JOHN W. HORNER and H. E. ROGERS, Appellees.	Error to the District Court of Arapahoe County.

Now comes the said appellees by John W. Horner, his attorney, and says that there is no error in the record and proceedings nor in the rendition of judgment by the said district court, as assigned herein, and therefore he prays that the said judgment may be affirmed, and that his costs may be adjudged to him, etc.

JOHN W. HORNER,
Attorney for Appellees.

(Endorsed as follows:)

No. 1254. In the supreme court, Colorado. Chever *vs.* Horner. Joinder in error. Filed in supreme court Dec. 14, 1883. James A. Miller, clerk.

103 And afterwards and on, to wit, April 24th, A. D. 1884, the same being one of the juridical days of the April, A. D. 1884, term of said supreme court—present, Honorable William E. Beck, chief justice; Honorable Wilbur F. Stone, justice; Honorable Joseph C. Helm, justice; George H. Graham, Esq., sheriff of Arapahoe county, by Matthew Adams, bailiff, and James A. Miller, clerk—the following further proceedings were had and entered of record in said supreme court, to wit:

CHARLES G. CHEVER, Appellant, *vs.* JOHN W. HORNER *et al.*, Appellees.	No. 1254. Appeal from the District Court of Arapahoe County.

At this day, as per stipulation of parties filed, it is ordered by the court that appellant file his reply herein on or before June 1st next hereafter, and that thereupon this cause be and stand submitted to the consideration and judgment of the court.

104 And afterwards and on, to wit, the 27th day of January, A. D. 1888, the said day being one of the juridical days of the December, A. D. 1887, term of said supreme court—present, Honorable William E. Beck, chief justice; Honorable Joseph C. Helm, justice; Honorable Samuel H. Elbert, justice; Albert Weber, Esquire, sheriff of Arapahoe county, by Felix A. Richardson, bailiff, and James A. Miller, clerk—the following further proceedings were had and entered of record in said court, to wit:

CHARLES G. CHEVER, Appellant, *vs.* JOHN W. HORNER and HENRY E. ROGERS, Appellees.	No. 1254. Appeal from the District Court of Arapahoe County.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Arapahoe, as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand
in full force and effect, and that this cause be remanded to
105 said district court for such other and further proceedings, ac-
cording to law, as shall be necessary to the final execution of
the judgment of said district court in the cause, notwithstanding
the said appeal.

It is further considered and adjudged by the court that said appellees do have and recover of and from said appellant their costs in this behalf expended, to be taxed, and that they have execution therefor; and let the opinion of the court filed herein be recorded.

And on, to wit, January 28th, A. D. 1888, the said supreme court filed in the office of the clerk of said supreme court its opinion in said cause, which is in words and figures following, to wit:

106 CHARLES G. CHEVER, Appellant,
vs.
JOHN W. HORNER and HENRY E. ROGERS, Appellees.
} No. 1254. Appeal from the County Court of Arapahoe County.

Chever, appellant, brought an action at law against the defendants, Rogers and Horner, for possession of lot 10, block 176, in the east division of the city of Denver, claiming ownership in fee simple.

The complaint alleged that Rogers wrongfully with-eld possession from the plaintiff, and that Horner claimed title adversely to him.

The defendants filed separate answers, Rogers saying he could not obtain information sufficient to form a belief whether the plaintiff was seized of any estate or interest in the lot, and Horner averring ownership in fee simple in himself, that Rogers was his tenant, and traversing the rights claimed by the plaintiff. The replication denied the rights and title claimed by Horner.

The property in controversy constitutes a portion of the original town site of the city of Denver, entered by James Hall, probate judge of Arapahoe county, May 6, 1865. The entry was made under and by virtue of the acts of Congress of May 23, 1844, and May 28, 1864 (5 U. S. Stat. at Large, p. 657, 13 U. S. Stat. at Large, p. 94), "in trust for the several use and benefit of the rightful occupants and *bona fide* owners of the improvements."

107 Upon the trial in the district court the plaintiff proved that he had filed upon the lot in question, in the office of the probate judge, on the 7th day of August, 1865. He also introduced in evidence a deed for said lot dated May 8, 1875, from William C. Kingsley, probate judge of Arapahoe county, to himself.

Defendant Horner introduced in evidence, to establish his title to the lot in controversy, a deed from Probate Judge Downing to John Hughes, bearing date October 24, 1867. This was followed by a deed from John Hughes to the defend*nat* of an undivided half of said lot, dated November 26, 1870, and a decree of the district court of Arapahoe county, in partition proceedings made and entered at the April term of 1877, vesting the other undivided half thereof in said defendant.

On rebuttal the plaintiff offered to prove that Hughes, grantee of Probate Judge Downing, never filed upon the lot as required by the territorial act of 1864; that at the time of the execution of Judge Downing's deed to him there were two filings upon the lot, one by the plaintiff and the other by one John M. Veasey; also that Hughes was not a beneficiary under the trusts created by the acts of Congress; that he was not an occupant or entitled to possession of the lot in controversy, and had no improvements thereon.

Plaintiff also offered to prove that on the 23rd day of May, 1873, he was in possession of the lot, and that on the 30th day of the same month the defendant Horner broke through the fence, moved a frame house upon the lot, and took possession thereof.

108 These offers of proof were all rejected by the court, exceptions being reserved by the plaintiff.

The act of Congress of May 23, 1844, authorizing the entry of town sites in trust for the use and benefit of the occupants, required the trust to be executed in respect to the disposal of lots and the proceeds of sales thereof, according to such regulations as might be prescribed by the legislative authority of the State or Territory in which the town site was situated; and it also provided "that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect."

The congressional act of May 28, 1864, entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado," extending the provisions of the former act to specific subdivisions of land, provided "that in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of 23rd of May, 1844, and the rules and regulations of the Commissioner of the General Land Office."

The territorial legislature, by an act approved March 11, 1864, prescribed rules and regulations for the execution of the trust arising under the former act, and by operation of law they were equally applicable to entries made under the latter act.

109 BECK, *C. J.:*

In construing the foregoing statutes this court has held that the execution and delivery of a deed to a portion of the Denver town site by a probate judge acting under and by virtue of these statutes was analogous to the granting of a patent by the Land Department of the Government, and that the same presumptions in favor of the regularity of such deed exists as in the case of a patent issued by the Government. It has long been a settled doctrine that a Government patent cannot be impeached collaterally nor the regularity of the proceedings anterior to its issue called in question in an action at law where the Land Department of the Government had jurisdiction to dispose of the land. The adjudications of the Supreme Court of the United States upon this point are reviewed in Anderson *vs.* Bartels, 7 Colo., 256, a case substantially similar to that here presented, and which we think conclusive of most of the questions raised by the assignment of errors in this case. It was there held that the conclusive presumptions attaching to a patent were applicable to the deed of a probate judge assuming to act under and by virtue of the United States and territorial town-site statutes.

One of the propositions assumed by appellant's counsel is that the present case should be distinguished from the Anderson case, because its essential facts are different and for the reason that the questions of law involved did not arise in the former case. We

reply that the controlling legal proposition is the same in both cases,
viz., can the prior deed executed by the probate judge be
110 collaterally impeached by proof that certain preliminary
requisites of the law have not been complied with? In the
former case this question was determined in the negative. Why
should it be determined differently in the present case?

The principal reasons assigned are that the deed sought to be impeached in the former case, that from Probate Judge Downing to Foy (through which by mesne conveyances defendant, Caroline E. Downing, deraigned title), was based upon a filing made in accordance with the territorial act of March 11, 1864, while no such proof was made in support of the Hughes deed in the present case. The plaintiff offered to show that no filing had been made by Hughes.

While the fact that Foy had made such filing was disclosed by the record in the former case, it was not a controlling fact in the decision. The doctrine announced was that the deed upon its face purported to have been issued in pursuance of the law, and was therefore only assailable in a direct proceeding to set it aside.

Another proposition insisted upon is that it was admissible to attack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is, "that the action of Downing in issuing the deed in question to Hughes was a
fraud upon the rights of the plaintiff in this case will hardly be
questioned." Whether this charge be true or not, the prop-
111 osition that upon this ground the validity of the deed was
examinable in an action of this character is in conflict with
the leading cases on the subject.

The doctrine is established by numerous decisions of the Supreme Court of the United States, that should the officers of the Land Department in issuing a patent err in respect to their duty or as to questions of fact or law, or even act from corrupt motives, the patent cannot be collaterally attacked for such cause if upon any state of facts the patent might have lawfully issued, and that against collateral attack it will be presumed the necessary facts existed. Parties aggrieved by such error or fraud must resort to a direct proceeding to set aside the patent.

Smelting Co. *vs.* Kemp, 14 Otto, 636.
Johnson *vs.* Towsley, 13 Wall., 72–83.
Moffitt *vs.* United States, 112 U. S., 24.

It is held in Field *vs.* Seabury, 19 How., 323–333, that when a patent has issued without any provisions incorporated for enquiring into its fairness as between grantor and grantee, or between third parties, a third party cannot raise, in ejectment, the question of fraud as between the grantor and grantee, and thus look beyond the patent. This case declares that a patent cannot be collaterally avoided at law for fraud, and that the court had never declared it could be done.

A third proposition is that the case comes within the two excep-

tions to the rule of conclusive presumptions mentioned in the
112 Anderson case, the first being when there is a contest between two patentees for the same land that a patent takes effect from the date of the original proceedings to obtain title, and in such case they are referred to for the purpose of ascertaining which of the contestants took the first steps, the other instance being under a statute declaring a patent void where no entry as an initiatory proceeding had been made.

These exceptions require explanation. In a contest between two patentees concerning the same tract of land, where the patents were issued by the Land Department of the Government under the general land laws thereof and the land in dispute was subject to entry and sale, the exception only applies to cases arising under certain State statutes which authorize such an inquiry into the prior equities in an action at law. It is not a general exception.

The exception also applies if the earlier patent issued without jurisdiction, as if the land was not then the property of the United States or was not open to entry and sale.

Another exception, and the one upon which the most of the cases cited by the appellant are based, relates to patents issued by the Government for lands in California under the treaty of 1846 with Mexico and the congressional act of 1851 passed in aid thereof. This exception will be explained hereafter.

As to the second class of exceptions, also arising under special statutes, the rule announced in the above-mentioned case was, if the patent is silent on the subject, it is competent to show the initiatory steps were not taken at all.

113 The rule contended for under this third proposition is that the filing upon a lot by a claimant, made in the office of the probate judge in pursuance of the territorial act of March 11, 1864, was the equivalent of an entry of land in a Government or State land office; that, as between conflicting claimants for the same lot, the party making the earlier filing, although holding the junior deed, is entitled to recover by virtue of the doctrine of relation, as "where two patents have been issued by the United States for the same property and the junior conveyance, by relation, has been held to convey the superior and better title."

When two patents for the same tract of land are issued by the Government, while the first patent conveys the lagal title the second may convey the equitable and better title. But the courts of the United States do not hold that the equitable title shall prevail in an action at law save in the excepted cases mentioned. It was so held in Ross *vs.* Barland, 1st Pet., 752, but the reason assigned by the court was that the cause originated in the State of Mississippi, where, according to the peculiar mode of proceeding in actions of ejectment, the courts "look beyond the grant and examine the progressive stages of the title from its incipient state * * * until its final consum-ation by grant, and if found regular and according to law in these progressive stages the grant is held to relate back to the inception of the right, and to have dignity accordingly."

In such a case the correctness of the practice, as established by

the courts of the State, could not be examined on writ of error to the Supreme Court of the United States, as stated in the syllabus of the case. The court, however, said: “Upon common-law
114 principle the legal title should prevail in the action of ejectment upon the same grounds that the legal right prevails in other actions in courts of law.”

This case is, therefore, not in point, since the practice mentioned does not prevail in this State.

The case of Sherman *vs.* Buick, 93 U. S., 209, was a contest at law between two patentees, who claimed the same tract of land—the plaintiff by a patent from the United States and the defendant by a patent issued by the State of California. The plaintiff held the junior grant, and it was held proper for him to introduce evidence of his prior entry, not for the purpose of impeaching or contradicting the State patent, but for the purpose of showing that when the State of California made her conveyance she had no title to the land. This case, therefore, fell within another exception.

The same character of testimony was held admissible for the same purpose in Polk's Lessee *vs.* Wendal, 9 Cranch, 87, a case strongly relied upon by the appellant in the present action. The plaintiff's title rested upon a patent issued by the State of North Carolina regular in all respects. The defendant relied upon an earlier patent, issued by the same State, purporting to convey the same lands. The lands in controversy comprised a portion of a tract of territory which had been ceded by the State of North Carolina to the Government of the United States many years prior to the issuing of either patent. At the time of the cession the right was reserved by the State to perfect incipient titles. It did not appear on the face of the defendant's patent that an incipient title had accrued prior to the cession, and the State authorities had not
115 jurisdiction to make a grant upon rights claimed to have accrued afterwards. On this point the court say: “After the cession the State of North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of that State,” p. 284.

The patent in the above case purported to have been made by virtue of certain warrants founded on entries. The plaintiff offered to prove that these entries were never made and that the warrants were forgeries. This evidence was excluded at the trial by the district court of the United States, but held to have been admissible by the Supreme Court on the principle announced in both this and the previous case, that the object of the testimony was to show that the State had no title to the thing granted and consequently acted without jurisdiction. If, as the court says, these warrants had no existence at the time of the cession, and no entries had been made, the grantee had no incipient rights. The patent being silent on this point, and there being a State statute requiring an entry to be made and declaring void all patents issued in violation of its provisions, the case comes clearly within both classes of exceptions referred to in the Anderson case.

These are the only classes of cases found by us where unconditional patents have been held open to examination at law.

116 The doctrine of relation so earnestly insisted upon by counsel for appellant as applicable to the case before us has frequently been applied in equity, and has likewise been applied under peculiar systems of procedure, as in the Mississippi case.

There are other instances, however, than those above given wherein it has been held proper in contests between patentees for the same land in legal actions to show "that a junior patent was founded upon an earlier entry than the older patent, and therefore passes the title." Most of the cases cited on part of the appellant have been of this character. These cases have arisen, as above stated, under treaty stipulations with Mexico, by virtue of which the territory embraced within the State of California was ceded to the United States, and under the act of Congress of March 3, 1851, passed to ascertain and settle the private land claims in that State.

By the treaty of cession the property rights of the inhabitants were to be protected to the same extent as under the former government. The act of Congress specified the manner and terms on which these treaty obligations would be discharged. All claims to land were to be presented within two years from the date of the act to a board of land commissioners for investigation or to be treated as abandoned. The claims were to be supported by evidence furnished by the claimants and Government officers were to appear and contest on behalf of the United States. Appeals were authorized from the land board to the district court of the United States and thence to the Supreme Court. Upon confirmation of a 117 claim by this special tribunal or on appeal the land was to be surveyed and located, and upon approval of the survey by Government officers a patent issued from the United States to the claimant.

As to the effect of the patent when issued it was held to operate as a relinquishment to the patentee of all interest of the United States in the land granted thereby and to be an official declaration that the claim was valid under the laws of Mexico and entitled to recognition under the treaty stipulations. As to claims to these lands made by other parties after the cession of the territory to the United States these patents are held conclusive and to take effect by relation at the time proceedings were instituted before the board of land commissioners by the parties whose rights were acquired under the Mexican government. They are held to convey to the patentee the legal title and to be conclusive in actions of ejectment as against all persons asserting imperfect or equitable titles or interests acquired after the cession of the territory.

This class of patents, however, reserves the rights of "third persons," in accordance with the provision of the act of March 3, 1851, that the final decree of confirmation and patent shall be conclusive between the United States and the claimants only, and shall not affect the rights of third persons. The third persons intended were held to be those whose rights were acquired under the former government.

We are of opinion that the adjudication of the State and Federal courts upon patents issued by the United States for lands in California claimed under Mexican and Spanish grants do not furnish a correct rule for the interpretation of a deed to a parcel of
118 land in the Denver town site executed by probate judge under and by virtue of the acts of Congress and of the territorial legislature relating to the subject.

The statement in the Anderson case, that a deed executed by the probate judge is analogous in effect to a patent granted by the Government, had reference to patents for lands of the United States issued by the Land Department under the public land laws of the Government. The adjudications upon the patents issued upon Mexican grants were necessarily variant from those made in cases arising under the public land laws. The laws, the principles involved, and the systems of procedure in the two cases are essentially different. In one case the patents, when regularly issued, are conclusive in actions at law of the rights of all persons; in the other, although the proceedings may be entirely regular, yet there is a reservation to those who may be able to show superior rights.

For these reasons the latter class of cases cannot control the construction of conveyances of the character under consideration. The decisions in the former class, in so far as they relate to the effect and conclusive character of patents made under systems of procedure similar to our own or in accordance with common law principles, are recognized authority in the construction of these deeds.

Under the acts of Congress above mentioned and the provisions of the act of the territorial legislature in aid thereof the probate judge holding the title to the town site in trust for the beneficiaries was authorized to convey the lots and parcels of land therein to those entitled to the same. This was a general jurisdiction
119 over the subject-matter, analogous to the jurisdiction of the Land Department of the Government over the issuing of patents to lands subject to entry under the land laws of the United States. Being invested with title and jurisdiction, Probate Judge Downing conveyed the lot in controversy to John Hughes, from whom appellee Horner deraigned title more than seven years prior to the conveyance of his successor, Judge Kingsley, to the appellant Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face, and purports to have been executed in pursuance of the authority vested in the grantor, it is not open to attack in this collateral proceeding for defects or omissions in the initiatory proceedings.

Referring to the copy of the deed set out in the transcript, the deed itself is shown to contain the recitals of the entry of the town site by Probate Judge James Hall; that for more effectually carrying out the trust secured by the act of Congress he conveyed by deed to his successor in office, Omer O. Kent, "all portions and lots of land not heretofore conveyed by him in accordance with said trust;" that said Omer O. Kent conveyed by deed to his successor in office, Jacob Downing, to effectuate the same purposes, "all portions and lots of land not heretofore conveyed by him in accordance with said trust." It also contains these further recitals: "And whereas the said party of the second part is justly entitled to the lots and parcels of ground hereinafter described as the rightful occupant thereof and the *bona fide* owner of the improvements thereon under the provisions of said act of Congress, now, therefore, in consideration of the premises and the sum of one dollar 120 by the party of the second part in hand paid to the said party of the first part under and by virtue of the act of Congress aforesaid and the laws of the Territory of Colorado, the said party of the first part doth hereby grant and convey unto the said party of the second part," etc.

It is seen from these recitals that the deed is neither void upon its face nor silent as to the authority of the officer to execute it. They are sufficient, under the principles announced and the authorities cited in support thereof, to raise the presumption, in an action of this character, that the necessary initiatory steps were taken in conformity with the law.

Respecting the error assigned as to the form of the judgment, the irregularity complained of is in no manner prejudicial to the appellant. The effect of the finding and judgment is that, in so far as this action is concerned, he had neither title nor right of possession. The judgment is affirmed.

Judgment affirmed.

(Endorsed as follows:)

Filed in supreme court January 28, 1888. James A. Miller, clerk.

121 And afterwards and on, to wit, February 10th, A. D. 1888, came said appellant and filed in said cause his petition for a rehearing therein, which is as follows, to wit:

In the Supreme Court of the State of Colorado, December Term, A. D. 1885.

CHARLES G. CHEVER, Appellant,
vs.
J. W. HORNER and HENRY E. ROGERS, Appellees.
} Motion for Rehearing.

Now comes said appellant, by J. Q. Charles, his attorney, and files this his petition for a rehearing in this cause, and as reasons for said motion says:

I. That this court erred in the opinion filed in this cause on January 28th, A. D. 1888, in holding that the said deed executed by Probate Judge Downing to John Hughes and given in evidence in this cause could not be attacked collaterally for fraud and corruption on the part of said judge in the execution of said deed under and by virtue of an act of the territorial legislature of March 11, 1864, and an act of Congress of May 28th, 1864.

II. That the court erred in this proceeding in holding that the appellant Cheever could not attack said deed by showing that said

Hughes had never filed on said lot, as provided in said act of said territorial legislature, and was not therefore a beneficiary under said act of Congress and said territorial legislature.

III. That the court erred in holding in said opinion that there was a conclusive presumption that the acts of said Probate Judge Downing were regular and correct, and that his actions with reference to issuing such deed could not be attacked collaterally in this cause.

122 IV. That the court erred in holding in said opinion that the doctrine of relation was not applicable to the facts of this case, and that the deed executed by Probate Judge Kingsley did not therefore relate back to the date of the filing of said Chever, thereby making the same an elder deed to that issued by Probate Judge Downing to said Hughes.

J. Q. CHARLES,
Attorney for Appellant.

(Endorsed as follows:)

In the supreme court, State of Colorado. Charles G. Cheever *vs.* J. W. Horner and Henry E. Rogers. Motion for rehearing. Filed in supreme court Feb. 10, 1888. James A. Miller, clerk.

And afterwards and on, to wit, April 5th, A. D. 1888, the said day being a juridical day of the April, A. D. 1888, term of said supreme court—present, Honorable William E. Beck, chief justice; Honorable Joseph C. Helm, justice; Honorable Samuel H. Elbert, justice; Albert Weber, Esquire, sheriff of Arapahoe county, by Felix A. Richardson, bailiff; and James A. Miller, clerk—the following further proceedings were had and entered of record by said supreme court in said cause, to wit:

123 CHARLES G. CHEVER, Appellant,
vs.
JOHN W. HORNER and HENRY E. ROGERS, Appellees.
} No. 1254. Appeal from the District Court of Arapahoe County.

At this day, upon consideration thereof, it is ordered by the court that the petition of said appellant for a rehearing herein be, and the same is hereby, denied.

124 And afterwards and on, to wit, May 29th, A. D. 1888, came said appellant and filed in the office of the clerk of said supreme court his complaint for writ of error and the allowance thereof in words and figures as follows, to wit:

"Supreme Court of Colorado, *ss:*

CHARLES G. CHEVER, Appellant,
vs.
JOHN W. HORNER and HENRY E. ROGERS,
Appellees.
Petition for Writ of Error.

To the Honorable William E. Beck, chief justice of the supreme court of the State of Colorado:

Now comes Charles G. Chever, appellant in the above-entitled cause, by J. Q. Charles, his attorney, and says that in the record and proceedings and also in the rendition of judgment in said suit between the said Charles G. Chever and J. W. Horner and Henry E. Rogers, in the supreme court of the State of Colorado, being the highest court of judicature of the said State in which decisions could be had in said suit, and in which a final judgment was rendered against the said Charles G. Chever and filed in said suit on the 28th day of January, 1888, and a motion for a rehearing in said suit was denied on the 5th day of April, 1888, wherein a title, right, and privilege were especially set up and claimed under the acts of Congress of May 28th, 1864, entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado," and of May 25 (23?), 1844, commonly called the "Denver town site acts," and the decision of the court was against the title, right, and privileges 125 especially set up and claimed by this appellant under said acts of Congress, all of which will more fully appear in the records and proceedings in said suit, *and* manifest error had happened, to the great damage of the said Charles G. Chever.

Wherefore he prays that a writ of error be allowed as well as such other processes as may cause the same to be corrected by the Supreme Court of the United States.

J. Q. CHARLES,
Attorney for Appellant.

Allowed this 29th day of May, 1888.

WILLIAM E. BECK,
Chief Justice Supreme Court of Colorado."

(Endorsed as follows:)

Charles G. Chever *vs.* J. W. Horner *et al.* Petition for writ of error. Filed in supreme court May 29, 1888. James A. Miller, clerk. J. Q. Charles, attorney for appellant.

And afterwards and on, to wit, June 1st, A. D. 1888, said appellant filed herein his citation as follows, to wit:

" In the Supreme Court of the United States.

CHARLES G. CHEVER, Plaintiff in Error,
vs.
JOHN W. HORNER and HENRY E. ROGERS, Defendants in Error.

126 The United States of America to John W. Horner and Henry E. Rogers:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Charles G. Chever is plaintiff in error and John W. Horner and Henry E. Rogers are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable William E. Beck, chief justice of the supreme court of the State of Colorado, this 1st day of June, A. D. 1888.

WILLIAM E. BECK,
Chief Justice Supreme Court of the State of Colorado.

(Endorsed as follows:) In the Supreme Court of the United States. Charles G. Chever, pl'ff in error, *vs.* John W. Horner *et al.*, def'ts in error. Citation. Filed in supreme court June 1, 1888. James A. Miller, clerk.

127 And on, to wit, June 2nd, 1888, said plaintiff in error filed in the office of the clerk of said Supreme Court his cost bond in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

Supreme Court.

CHARLES G. CHEVER, Plaintiff in Error,
vs.
JOHN W. HORNER and HENRY E. ROGERS,
Defendants in Error.
} Bond for Clerk's Fees.

Know all men by these presents that we, Robert H. McMann and George W. Clayton, of the county of Arapahoe and State of Colorado, are held and firmly bound unto James Hall McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said James Hall McKenney, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2nd day of June, in the year of our Lord one thousand eight hundred and eighty-eight. Whereas lately in a suit depending in the supreme court of the State of Colorado between Charles G. Chever and John W. Horner and Henry E. Rogers, the parties named in the above-entitled cause, a judgment was rendered against the said Charles G. Chever, and the said Charles G. Chever having obtained a writ of error to remove the said cause to the Supreme Court of the United States and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

128 Now, the condition of the above obligation is such that if the said obligors shall well and truly pay or cause to be paid to the said James Hall McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to the said James Hall McKenney, clerk as aforesaid, and charge to the said Charles G. Chever in the prosecution of the said writ of error, then the above obligation to be void; otherwise to remain in full force and virtue.

R. H. McMANN. [L. S.]
G. W. CLAYTON. [L. S.]

Sealed and delivered in the presence of—
F. W. STANDART.

(Endorsed as follows:) In the Supreme Court of the United States. Charles G. Chever, plaintiff in error, *vs.* John W. Horner *et al.*, defendants in error. Cost bond approved and filed in the supreme court of Colorado this 4th of June, A. D. 1888. James A. Miller clerk.

129 And afterwards and on the same day said appellant filed his præcipe for this record as follows:

STATE OF COLORADO, *ss:*

In the Supreme Court.

CHARLES G. CHEVER, Appellant.
vs.
JOHN W. HORNER *et al.*, Appellees. } No. 1254.

To the clerk of the supreme court of the State of Colorado:

You will make a duly certified transcript and transmit to the clerk of the Supreme Court of the United States in the above-entitled cause of the transcript of record of the district court of Arapahoe county in said cause, the assignments of error appended thereto, all proceedings had in said supreme court except the rules entered for the filing of abstracts of record and briefs of parties, the complaint for writ of error and allowance thereof by the chief justice of said supreme court, the citation and proof of service, the cost bond of said appellant, together with the original bill of exceptions.

J. Q. CHARLES,
Attorney for Pl'ff in Error.

(Endorsed as follows:) Charles G. Chever, appellant, *vs.* John W. Horner *et al.*, appellees. Præcipe for record for Supreme Court of the United States. Filed in the supreme court June 2, 1888. James A. Miller, clerk.

130 STATE OF COLORADO, *ss:*

I, James A. Miller, clerk of the supreme court of the State of Colorado, hereby certify the foregoing to be a true and complete copy of a duly certified transcript of the record and proceedings of a certain cause lately pending in the district court of Arapahoe county, in the State aforesaid, wherein Charles G. Chever was plaintiff and John W. Horner and Henry E. Rogers were defendants, filed in said supreme court upon appeal from the judgment of said district court by said plaintiff, with his assignment of errors thereto appended, as also all proceedings had in said supreme court upon said appeal, save and except the rules entered in said cause for the filing of abstracts of record and briefs by the respective parties, the complaint of said appellant for writ of error from the Supreme Court of the United States and allowance thereof by the chief justice of this supreme court, the citation, the cost bond filed by said appellant, the præcipe for this record, together with the original bill of exceptions, and to which said transcript is appended the original writ of error and return endorsed thereon.

Seal Supreme Court,
State of Colorado.

Witness my hand and the seal of said supreme court hereto affixed, at my office, in the city of Denver, this fourth day of June, A. D. 1888.

JAMES A. MILLER,
Clerk Supreme Court, Sate of Colorado.

Cost of this transcript:

347 folios, 20c.	$69 40
Certificate	1 00
	$70 40

Paid by pl'ff in error.

J. A. MILLER,
Cl'k S. C., Col.

131 *Bill of Exceptions.*

CHARLES G. CHEVER, Appellant,
vs.
JOHN W. HORNER and HENRY E. ROGERS,
Appellees.

No. 1254. Appeal from the County Court of Arapahoe County.

Chever, appellant, brought an action at law against the defendants Rogers and Horner for possession of lot 10, block 176, in the east division of the city of Denver, claiming ownership in fee simple.

The complaint alleged that Rogers wrongfully withheld possession from the plaintiff, and that Horner claimed title advers ly to him.

The defendants filed separate answers; Rogers saying he could not obtain information sufficient to form a belief whether the plaintiff was seized of any estate or interest in the lot, and Horner averring ownership in fee simple in himself; that Rogers was his tenant and traversing the rights claimed by the plaintiff. The replication denied the rights and title claimed by Horner.

The property in controversy constitutes a portion of the original town site of the city of Denver entered by James Hall, probate judge of Arapahoe county, May 6, 1865. The entry was made under and by virtue of the acts of Congress, May 23, 1844, and May 28, 1864 (U. S. Stat. at Large, p. 657; U. S. Stat. at Large, p. 94), "in trust for the several use and benefit of the rightful occupants and *bona fide* owners of the improvements."

132 Upon the trial in the district court the plaintiff proved that he had filed upon the lot in question in the office of the probate judge on the 7th day of August, 1865. He also introduced in evidence a deed for said lot, dated May 8, 1875, from William C. Kingsley, probate judge of Arapahoe county, to himself.

Defendant Horner introduced in evidence, to establish his title to the lot in controversy, a deed from Probate Judge Downing to John Hughes, bearing date October 24, 1867. This was followed by a deed from John Hughes to the defendant of an undivided half of said lot, dated November 26, 1870, and a decree of the district court of Arapahoe county, in partition proceedings, made and entered at the April term of 1877, vesting the other undivided half thereof in said defendant.

On rebuttal the plaintiff offered to prove that Hughes, grantee of Probate Judge Downing, never filed upon the lot as required by the territorial act of 1864; that at the time of the execution of Judge Downing's deed to him there were two filings upon the lot, one by the plaintiff and the other by one John M. Veasey; also that Hughes was not a beneficiary under the trust created by the acts of Congress; that he was not an *occupant*, or entitled to possession of the lot in controversy and had no improvements thereon.

Plaintiff also offered to prove that on the 23rd day of May, 1873, he was in possession of the lot, and that on the 30th day of the same month the defendant Horner broke through the fence, moved a frame house upon the lot, and took possession thereof.

These offers of proof were all rejected by the court, exceptions being reserved by the plaintiff.

133 The act of Congress of May 23, 1844, authorizing the entry of town sites in trust for the use and benefit of the occupants required the trust to be executed, in respect to the disposal of lots and the proceeds of sales thereof, according to such regulations as might be prescribed by the legislative authority of the State or Territory in which the town site was situated; and it also provided "that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void and of none effect."

The congressional act of May 28, 1864, entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado," extending the provisions of the former act to specific subdivisions of land, provided "that in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of 23rd of May, 1844, and the rules and regulations of the Commissioner of the General Land Office."

The territorial legislature, by an act approved March 11, 1864, prescribed rules and regulations for the execution of the trust arising under the former act, and by operation of law they were equally applicable to entries made under the latter act.

134 BECK, *C. J.:*

In construing the foregoing statutes this court has held that the execution and delivery of a deed to a portion of the Denver town site by a probate judge, acting under and by virtue of these statutes, was analogous to the granting of a patent by the Land Department of the Government, and that the same presumptions in favor of the regularity of such deed exists as in the case of a patent issued by the Government. It has long been a settled doctrine that a Government patent cannot be impeached collaterally nor the regularity of the proceedings anterior to its issue called in question in an action at law where the Land Department of the Government had jurisdiction to dispose of the land. The adjudications of the Supreme Court of the United States upon this point are reviewed in Anderson *vs.* Bartels, 7 Colo., 256, a case substantially similar to that here presented, and which we think conclusive of most of the questions raised by the assignment of errors in this case. It was there held that the conclusive presumptions attaching to a patent were applicable to the deed of a probate judge assuming to act under and by virtue of the United States and territorial town site statutes.

One of the positions assumed by appellant's counsel is that the present case should be distinguished from the Anderson case because its essential facts are different and for the reason that the questions of law involved did not arise in the former case. We reply that the controlling legal proposition is the same in both cases, viz., can the prior deed executed by the probate judge
135 be collaterally impeached by proof that certain preliminary requisites of the law have not been complied with? In the former case this question was determined in the negative. Why should it be determined differently in the present case?

The principal reasons assigned are that the deed sought to be impeached in the former case, that from Probate Judge Downing to Foy (through which by mesne conveyances defendant Caroline E. Downing deraigned title), was based upon a filing made in accordance with the territorial act of March 11, 1864, while no such proof was made in support of the Hughes deed in the present case, and plaintiff offered to show that no filing had been made by Hughes.

While the fact that Foy had made such filing was disclosed by the record in the former case, it was not a controlling fact in the decision. The doctrine announced was that the deed upon its face purported to have been issued in pursuance of the law, and was therefore only assailable in a direct proceeding to set it aside.

Another proposition insisted upon is that it was admissible to at-

tack the Hughes deed for fraud in its execution, and for this purpose the offer to prove that Hughes had never filed upon the lot in question should have been allowed. The fraud alluded to is imputed to the probate judge. The language of counsel is "that the action of Downing in issuing the deed in question to Hughes was a fraud upon the rights of the plaintiff in this case will hardly
136 be questioned," etc. Whether this charge be true or not, the proposition that upon this ground the validity of the deed was examinable in an action of this character is in conflict with the leading cases on the subject.

The doctrine is established by numerous decisions of the Supreme Court of the United States that, should the officers of the land department issuing a patent err in respect to their duty or as to questions of fact or law or even act from corrupt motives, the patent cannot be collaterally attacked for such cause if upon any state of facts the patent might have lawfully issued, and that against collateral attack it will be presumed the necessary facts existed. Parties aggrieved by such error and fraud must resort to a direct proceeding to set aside the patent.

Smelting Co. *vs.* Kemp, 14 Otto, 636.
Johnson *vs.* Towsley, 13 Wall., 72–83.
Moffitt *vs.* United States, 112 U. S., 24.

It is held in Field *vs.* Seabury, 19 How., 323–333, that when a patent has issued without any provisions incorporated for inquiring into the fairness as between grantor and grantee or between third parties a third party cannot raise in ejectment the question of fraud as between the grantor and grantee and thus look beyond the p oe ent. This case declares that a patent cannot be collaterally avoi ro- at law for fraud, and that the court had never declared it coul re- done.

A third proposition is that the cases comes within the two exce n- tions to the rule of conclusive presumptions mentioned in
137 the Anderson case—the first being when there is a contest between the patentees for the same land that a patent takes effect from the date of the original proceedings to obtain title, and in such case they are referred to for the purpose of ascertaining which of the contestants took the first steps; the other instance being under a statute declaring a patent void where no entry as an initiatory proceeding had been made.

These exceptions require explanation. In a contest between two patentees concerning the same tract of land, where the patents were issued by the Land Department of the Government under the general land laws thereof, and the land in dispute was subject to entry and sale, the exception only applies to cases arising under certain State statutes authorizing such an inquiry into the prior equities in an action at law. It is not a general exception.

The exception also applies if the earlier patent issued without jurisdiction—as if the land was not then the property of the United States or was not open to entry and sale.

Another exception and the one upon which the most of the cas cited by the appellant are based relates to patents issued by the Government for lands in California under the treaty of 1846 with Mexico and the congressional act of 1851 passed in aid thereof. This exception will be explained hereafter.

As to the second class of exceptions, also arising under special statutes, the rule announced in the above-mentioned case was—if the patent is silent on the subject it is competent to show the initiatory steps were not taken at all.

138 The rule contended for under the third proposition is that the filing upon a lot by a claimant, made in the office of the probate judge in pursuance of the territorial act of March 11, 1864, was the equivalent of an entry of land in a Government or State land office. That as between conflicting claimants for the same lot, the party making the earlier filing, although holding the junior deed, is entitled to recover by virtue of the doctrine of relation, as "where two patents have been issued by the United States for the same property, and the junior conveyance, by relation, has been held to convey the superior and better title."

When two patents for the same tract of land are issued by the Government, while the first patent conveys the legal title, the second may convey the better and equitable title. But the courts of the United States do not hold that the equitable title shall prevail in an action at law, save in the excepted cases mentioned. It was so held in Ross *vs.* Barland, 1st Peter, 752, but the reason assigned by the court was that the cause originated in the State of Mississippi, where, according to the peculiar mode of proceeding in actions of ejectment, the courts "look beyond the grant and examine the progressive stages of the title from its incipient state * * until its actual consum-ation by grant; and if found regular and according to law in these progressive stages, the grant is held to relate back to the inception of the right, and to have dignity accordingly."

In such a case the correctness of the practice, as established by the courts of the State, could not be examined on writ of error to the Supreme Court of the United States, as stated in the syllabus of the case. The court, however, said: "Upon common-law principles the legal title should prevail in the action of ejectment,
139 upon the same grounds that the legal right prevails in other actions in courts of law."

This case is, therefore, not in point, since the practice mentioned does not prevail in this State.

The case of Sherman *vs.* Buick, 93 U. S., 209, was a contest at law between two patentees, who claimed the same tract of land, the plaintiff by a patent from the United States, and the defendant by a patent issued by the State of California. The plaintiff held the junior grant, and it was held proper for him to introduce evidence of his prior entry, not for the purpose of impeaching or contradicting the State patent, but for the purpose of showing that when the State of California made her conveyance she had no title to the land. This case, therefore, fell within another exception.

The same character of testimony was held admissible, for the same purpose, in Polk's Lessees *vs.* Wendal, 9 Cranch, 87, a case strongly

relied upon by the appellant in the present action. The plaintiff's title rested upon a patent issued by the State of North Carolina, regular in all respects. The defendant relied upon an earlier patent issued by the same State, purporting to convey the same lands. The lands in controversy comprised a portion of a tract of territory which had been ceded by the State of North Carolina to the Government of the United States many years prior to the issuing of either patent. At the time of the cession the right was reserved by the State to perfect incipient titles. It did not appear on the face of the defendant's patent that an incipient title had accrued prior to
140 the cession, and the State authorities had not jurisdiction to make a grant upon the rights claimed to have accrued afterwards. On this point the court say: "After the cession, the State — North Carolina had no power to sell an acre of land within the ceded territory. No right could be acquired under the laws of that State." P. 284.

The patent in the above case purported to have been made by virtue of certain warrants founded on entries. The plaintiff offered to prove that these entries were never made and that the warrants were forgeries. This evidence was excluded at the trial by the district court of the United States, but held to have been admissible by the Supreme Court on the principle announced in both this and the previous case, that the object of the testimony was to show that the State had no title to the thing granted, and consequently acted without jurisdiction. If, as the court says, these warrants had no existence at the time of the cession and no entries had been made the grantee had no incipient rights. The patent being silent o this point and there being a State statute requiring an entry to l made and declaring void all patents issued in violation of its p visions, the case comes clearly within both classes of exceptions e-ferred to in the Anderson case.

These are the only classes of cases found by us where unc-ditional patents have been held open to examination at law.

The doctrine of relation, so earnestly insisted upon by counsel for appellant as applicable to the case before us, has frequently been applied in equity and has likewise been applied under peculiar systems of procedure as in the Mississippi case.

141 There are other instances, however, than those above given wherein it has been held proper in contests between patentees for the same land in legal actions to show "that a junior patent was founded upon an earlier entry than the older patent and therefore passes the title." Most of the cases cited on the part of the appellant have been of this character. These cases have arisen, as above stated, under treaty stipulations with Mexico, by virtue of which the territory embraced within the State of California was ceded to the United States, and under the act of Congress of March 3, 1851, passed to ascertain and settle the private land claims in that State.

By the treaty of cession the property rights of the inhabitants were to be protected to the same extent as under the former Government. The act of Congress specified the manner and terms on which these treaty obligations would be discharged. All claims to land were to be presented within two years from the date of the act to a board of land commissioners for investigation or to be treated as abandoned. The claims were to be supported by evidence furnished by the claimants and Government officers were to appear and contest on behalf of the United States. Appeals were authorized from the land board to the district court of the United States and thence to the Supreme Court. Upon confirmation of a claim by this special tribunal or on appeal the land was to be surveyed and located, and upon approval of the survey by Government officers a patent issued from the United States to the claimant.

142 As to the effect of the patent when issued it was held to operate as a relinquishment to the patentee of all interest of the United States in the land granted thereby and to be an official declaration that the claim was valid under the laws of Mexico and entitled to recognition under the treaty stipulations. As to claims to these lands made by other parties after the cession of the territory to the United States, these patents are held conclusive and to take effect by relation at the time proceedings were instituted before the board of land commissioners by the party whose rights were acquired under the Mexican government. They are held to convey to the patentee the legal title and to be conclusive in actions of ejectment as against all persons asserting imperfect or equitable titles or interests acquired after the cession of the territory.

This class of patents, however, reserve the rights of "third per[illegible]ns," in accordance with the provisions of the act of March 3, 1851, [illegible]at the final decree of confirmation and patent shall be conclusive [illegible]veen the United States and the claimant only, and shall not [illegible]t the rights of third persons. The third persons intended were [illegible] to be those whose rights were acquired under the former gov[illegible]ment.

We are of opinion that the adjudications of the State and Federal courts upon patents issued by the United States for lands in California claimed under Mexican and Spanish grants do not furnish a correct rule for the interpretation of a deed to a parcel of land in the Denver town site executed by probate judge under and by virtue of the acts of Congress and of the territorial legislature relating to the subject.

143 The statement in the Anderson case that a deed executed by the probate judge is analogous in effect to a patent granted by the Government had reference to patents for lands in the United States issued by the Land Department under the public land laws of the Government. The adjudications upon patents issued upon Mexican grants were necessarily variant from those made in cases arising under the public land laws. The laws, the principles involved, and the systems of procedure in the two cases are essentially different. In one case the patents, when regularly issued, are conclusive in actions at law of the rights of all persons. In the other, although the proceedings may be entirely regular, yet

there is a reservation to those who may be able to show superior rights.

For these reasons the latter class of cases cannot control the construction of conveyances of the character under consideration. The decisions in the former class, in so far as they relate to the effect and conclusive character of patents made under systems of procedure similar to our own or in accordance with common-law principles, are recognized authority in the construction of these deeds.

Under the acts of Congress above mentioned and the provisions of the act of the territorial legislature in aid thereof, the probate judge holding the title to the town site in trust for the beneficiaries was authorized to convey the lots and parcels of land therein to those entitled to the same. This was a general jurisdiction
144 over the subject-matter analogous to the jurisdiction of the
Land Department of the Government over the issuing of patents to lands subject to entry under the land laws of the United States. Being invested with title and jurisdiction, Probate Judge Downing conveyed the lot in controversy to John Hughes, from whom appellee Horner deraigned title more than seven years prior to the conveyance by his successor, Judge Kingsley, to the appellant Chever. If, then, the deed from Judge Downing to Hughes is regular upon its face and purports to have been executed in pursuance of the authority vested in the grantor it is not open to attack in this collateral proceeding for defects or omissions in the iniatory proceedings.

Referring to the copy of the deed set out in the transcript, th deed itself is shown to contain the recitals of the entry of the to site by Probate Judge James Hall; that for more effectually car ing out the trust secured by the act of Congress, he conveyed deed to his successor in office, Omer O. Kent, "all portions and of land not heretofore conveyed by him in accordance with trust;" that said Omer O. Kent conveyed by deed to his successo office, Jacob Downing, to effectu-te the same purposes, "all portio and lots of land not heretofore conveyed by him in accordance with said trust." It also contains these further recitals: "And whereas the said party of the second part is justly entitled to the lots and parcels of ground hereinafter described as the rightful occupant thereof and the *bona fide* owner of the improvements thereon under the provisions of said act of Congress: Now, therefore, in considera-
tion of the premises and the sum of one dollar by the party
145 of the second part, in hand paid to the said party of the first
part, under and by virtue of the act of Congress aforesaid and the laws of the Territory of Colorado, the said party of the first part doth hereby grant and convey unto the said party of the second part," etc.

It is seem from these recitals that the deed is neither void upon its face nor silent as to the authority of the officer to execute it. They are sufficient, under the principles announced and the authorities cited in support thereof, to raise the presumption in an action of this character that the necessary initiatory steps were taken in conformity with the law.

Respecting the error assigned as to the form of the judgment, the irregularity complained of is in no manner prejudicial to the appellant. The effect of the finding and judgment is that in so far as this action is concerned he had neither title nor right of possession.

The judgment is affirmed.

And inasmuch as the above matters do not fully appear of record in said cause the appellants tender this their bill of exceptions, which they pray may be signed, sealed, and ordered to be made a part of the record in this cause.

All of which is accordingly done this thirty-first day of May, A. D. 1888.

WM. E. BECK, [SEAL.]
Chief Justice Supreme Court of the State of Colorado.

[Endorsed:] 1254. Charles G. Cheever, appellant, *v.* Jno. W. Horner *et al.*, appellees. Bill of exceptions. Filed in supreme court Jun. 1, 1888. James A. Miller, clerk.

146 UNITED STATES OF AMERICA, *ss:*

Supreme Court.

CHARLES G. CHEVER, Plaintiff in Error,
vs.
JOHN W. HORNER *et al.*, Defendants in Error.
} Assignment of Errors.

Of the October term, in the year of our Lord one thousand eight hundred and eighty-eight.

Afterwards, to wit, on the second Monday of October in this same [illegible]m, before the justices of the Supreme Court of the United States, [illegible]he capitol, in the city of Washington, comes the said Charles G. [illegible]ver, plaintiff in error, by J. Q. Charles, his attorney, and says [illegible]t in the record and proceedings aforesaid there is manifest error [illegible] this—

That by the record aforesaid it appears that the judgment aforesaid given was given for the said John W. Horner and Henry E. Rogers, defendants in error, against the said Charles G. Chever, plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said Charles G. Chever, plaintiff in error, and against the said John W. Horner and Henry E. Rogers, defendants in error.

147 There was also error in this, to wit, the said supreme court of Colorado erred in holding that the deed executed by Probate Judge Downing to John Hughes, under and by virtue of the said act of Congress for the relief of the citizens of Denver, approved May the 17th, 1864, and the act of the legislature of the Territory of Colorado, prescribing rules and regulations for the execution of the trust arising under said act of Congress, could not be impeached in this action by showing that the said Hughes never became a beneficiary under said act of Congress by filing a statement of his claim to the said lot in controversy as prescribed in section three of said act of said territorial legislature, and that said deed could not

be assailed in this suit by showing such a violation of said acts of Congress and of said territorial legislature by said probate judge in the execution of said deed.

There was also error in this, to wit, that said supreme court erred in holding that the issuance of deeds by the probate judge under and by virtue of said acts of Congress and of the territorial legislature was analogous to the granting of a patent by the Land Department of the United States Government, and that in the issuance of such deeds it must be conclusively presumed that the probate judge complied with all the conditions of said acts.

There is also error in this, to wit, that said supreme court erred in holding that the said deed issued by said probate judge to said Hughes was the elder deed in point of date, and that the said deed issued to said plaintiff in error by Probate Judge Kingsley under and by virtue of said acts did not relate back to the date of 148 the filing by said Chever of his statement of claim to said lots as prescribed by the rules and regulations adopted by said territorial legislature and as provided by said act of Congress.

Wherefore the said Charles G. Chever prays that the said judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment, &c.

J. Q. CHARLES,
Attorney for Plaintiff in Error.

149 In the Supreme Court of the United States.

CHARLES G. CHEVER, Plaintiff in Error,
vs.
JOHN W. HORNER and HENRY E. ROGERS, Defendants in Error.

The United States of America to John W. Horner and Henry Rogers:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Charles G. Chever is plaintiff in error and John W. Horner and Henry E. Rogers are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William E. Beck, chief justice of the supreme court of the State of Colorado, this 1st day of June, A. D. 1888.

WM. E. BECK,
Chief Justice Supreme Court of the State of Colorado.

150 [Endorsed:] 1254. In the Supreme Court of the United States. Charles G. Chever, pl'ff in error, *v.* John W. Horner *et al.*, def'ts in error. Citation. Filed in supreme court July 9, 1888. James A. Miller, clerk.

STATE OF COLORADO, } *ss:*
Arapahoe County, }

I do hereby certify that I have executed this writ on this the fourth day of June, 1888, by delivering a true copy of the same to John W. Horner, one of the def'ts named *t*her-in; the said Henry E. Rogers, the other defendant mentioned herein, died about four months before the date of this service, and is not therefore served.

A. H. WEBER,
Sheriff of Arapahoe County,
By F. A. RICHARDSON,
Deputy Sheriff.

151 STATE OF COLORADO, *ss:*

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is the original citation in the cause in which it is entitled, with the return of the sheriff's service thereon endorsed, filed in my office on the ninth day of July, A. D. 1888, and now remaining of record in my office.

Seal Supreme Court, State of Colorado.

Witness my hand and the seal of the court affixed, at my office, in the city of Denver, this ninth day of July, A. D. 1888.

JAMES A. MILLER, *Clerk.*

Endorsed on cover: Colorado supreme court. No. 116. Charles G. Chever, plaintiff in error, *vs.* J. W. Horner and Henry E. Rogers. Filed September 24, 1888.

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JAMES H. McKENNEY,
CLERK

Brief and Argument Submitted in Behalf of the Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES G. CHEVER, *Plaintiff, in Error,*

VS.

J. W. HORNER AND HENRY E. ROGERS,
Defendants in Error.

Error to the Supreme Court of the State of Colorado.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1891.

No. 116.

CHARLES G. CHEVER, *Plaintiff in Error,* vs. J. W. HORNER AND HENRY E. ROGERS, *Defendants in Error.*	*Error to the Supreme Court of the State of Colorado.*

Brief and Argument Submitted in Behalf of the Plaintiff in Error.

Charles G. Chever, the plaintiff in error, brought this action of ejectment against the defendants in error, Horner & Rogers, to recover the possession of lot 10, block 176, in the east division of the City of Denver, claiming ownership by title in fee simple. It is alleged in the complaint that Rogers wrongfully withheld the possession of said lot, and that Horner claimed title adversely to the plaintiff. The defendants file separate answers, Rogers avering that he could not obtain information sufficient to form a belief, whether the plaintiff was seized of any estate or interest in the lands and premises described in the complaint, the defendant Horner claiming ownership by title in fee simple in himself, alleging that Rogers occupied said lot as his tenant, and traversing the right and title claimed by the plaintiff. The replication denies the right and title claimed by defendant Horner, thus forming an issue of title between the plaintiff and Horner as to the ownership of said lot. The lot in dispute constitutes a part of the original town site of Denver, entered by James Hall, Probate Judge of Arapahoe County, Colorado, May 6, 1865. (See Record, page 24, folio 37). This entry was made under and by virtue of the acts of Congress of May 28, 1864, and May 23, 1844, for the relief of the citizens of Denver. (See Statutes at Large, vol. 5, page 657, and vol. 13, page 94 and 95). In conformity with the provisions of the act of 1844, the legislature of Colorado Territory passed an act approved March 11, 1864, prescribing rules and regulations for the execution of the trust arising under the provisions of said acts of Congress. (See Sess. Laws of Colo. for 1864, pages 139 to 149; also, Rev. Statutes of Colo. for 1868, pages 619 to 629). The operation of this act was applicable to the Denver town site when entered by the Probate Judge under and by virtue of said act of Congress of May, 28, 1864. The several sections of this act, bearing upon the disputed questions involved in this case, will be noticed hereafter in our argument.

The plaintiff, and defendant Horner, both deraign title to the lot in dispute, under the entry of the Denver town site, made by James Hall, Probate Judge of Arapahoe County, Colorado, by virtue of the foregoing acts of Congress and said act of the legislature of Colorado Territory, prescribing rules and regulations for the execution of said trust.

Upon the trial of the cause by the court, a jury being waived by the parties, the plaintiff, in support of his title, proved that he had filed upon the lot in question in the office of the Probate Judge on the 7th of August, A. D. 1865, in conformity with section 4 of said act of the legislature of Colorado Territory, approved March 11, 1864, before referred to. (See Record, pages 35 and 36, folios 52–53). This evidence was followed by testimony tending to show the plaintiff's rights of possession and occupancy, under the provisions of said acts of Congress above mentioned. (See Record, pages 36 to 49, folios 53 to 71). Further, in support of the plaintiff's title, the patent from the United States to James Hall, Probate Judge of Arapahoe County, as trustee, was given in evidence. (See Record, page 25, folio 39; also, deeds conveying the residue or unexecuted portions of said trust from James Hall to Omer O. Kent, his successor in office; from Kent to Jacob Downing, his successor in office; from Downing to Henry A. Clough, his successor in office, and from Clough to W. C. Kingsley, his successor in office. (See Record, pages 27 to 35, folios 40 to 52); also, a deed for said lot from William C. Kingsley, Probate Judge of Arapahoe County, Colorado, to Charles G. Chever, the plaintiff in this suit. (See Record, pages 49 to

51). The plaintiff offered also in evidence a book kept by Probate Judge Hall, of the filing of claimants to lots in the Denver town site for the purpose of showing who filed claims for said lots, under the fourth section of said act of the territorial legislature, and who did not, to which objection was made and sustained by the court and an exception reserved. (See Record, page 53, folio 77). The defendant admitted ouster and that the lot in dispute was a portion of the Denver town site entry. (See Record, page 53, folio 76 and 77).

The defendant Horner, in support of his title to said lot, introduced in evidence a deed from Probate Judge Downing to one John Hughes, dated October 24, 1867; also, a deed from said Hughes to himself for an undivided half of said lot, and a decree of the District Court of Arapahoe County, Colorado, in partition proceedings vesting in him the other undivided half of said lot. To the introduction of this evidence the plaintiff objected and reserved an exception. (See Record, pages 54 to 64, folios 78 to 93).

In rebuttal the plaintiff offered evidence tending to prove that John Hughes, to whom Probate Judge Downing, as trustee, conveyed the lot in dispute, never filed upon the same as required by section 4 of the Territorial act of 1864. That at the time of the execution of Judge Downing's deed to Hughes there were two filings upon said lot undetermined, one by plaintiff and the other by one John M. Veasey; that Hughes was not a beneficiary under the acts of Congress creating the trust; that he was not an occupant or entitled to the possession of said lot, and had no improvements thereon. The plaintiff also offered to prove that on and prior to May 23, 1873, the plaintiff was in possession of said lot and had a fence around the same, and afterward, on or about the 30th of May, 1873, the defendant Horner broke through said fence, moved a frame house on said lot, took possession of it and ousted the plaintiff therefrom. These offers of proof were objected to by the defendant, the objections sustained by the court and exceptions reserved by the plaintiff. (See Record, pages 65 to 67, folios 94 to 98).

The court found for the defendant. A motion for a new trial was interposed and denied, exception reserved; and judgment entered in favor of the defendant. (See Record, pages 21 and 22, folios 32 and 33).

The cause was then taken to the Supreme Court of Colorado by appeal. (See Record, pages 22 to 24, folio 34). The errors assigned in the Supreme Court of Colorado will be found on pages 68 and 69 of the Record. These errors, so far as noticed in the opinion of the Supreme Court of Colorado, are incorporated in the errors assigned in this court. (See Record, pages 91 and 92).

On this statement of facts the Supreme Court of Colorado, without noticing some of the errors assigned on the Record, held: First, that the deed executed by Probate Judge Downing, as trustee to John Hughes, dated October 24, 1867, under and by virtue of which the defendant Horner derives title, was analogous to the granting of a patent by the land department of the government, that the same presumptions in favor of the regularity of such deed exist, as in the case of a patent issued by the government, and that this presumption was conclusive between the parties to this suit, not open to attack in an action of ejectment, and if assailable at all, it must be by direct proceedings in a court of equity. Second, that the deed executed to the plaintiff by Probate Judge Kingsley, after a full investigation of the rights of the parties claiming said lot under and by virtue of said town site acts, as appears upon the face of said deed, did not relate back to the date, when the plaintiff filed his claim for said lot, under section four of said act of the territorial legislature, viz., August 7, 1865, thus showing, by reason of such relation, an older and better title to the lot than that of the defendant Horner, under the deed executed by Probate Judge Downing to John Hughes.

These two propositions cover substantially the entire ground of contention between the parties to this suit, so far as they are noticed in the opinion delivered by the Supreme Court of Colorado. There is no controversy with respect to the patent issued to Probate Judge Hall upon the entry of the Denver town site by him. Both parties claim title under this patent, and the provisions of the acts of Congress, and territorial legislature, creating the trust and regulating its execution.

I.

On the first proposition we respectfully submit that the Supreme Court of Colorado erred in holding that the deed executed by Probate Judge Downing to John Hughes, under and by virtue of the provisions of said town site act, was conclusive of the rights of the parties, and not open to attack in this action. This proposition, when examined in connection with the facts of this case, is not, we submit, in harmony with the decisions of this court.

1. It is admitted in the outset that there are cases in this court holding that a patent issued by

the proper officers of the government cannot be collaterally assailed in an action at law, but the rule has no application to a case where it is made to appear that the officer issuing the patent acted without authority. In Doolan vs. Carr, 125 U. S., page 618, extrinsic evidence was offered in the trial court tending to show a want of authority in the officer to issue the patent on which the plaintiff based his title. The action was ejectment, and the evidence was excluded upon the ground that the patent could not be attacked in a collateral manner, and was conclusive of the rights of the parties. This court held that the exclusion of the evidence was error. Justice Miller, speaking for the court in explanation of the former decisions of the court upon this proposition, says: "There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority—if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority—then their act was void,—void for want of power in them to act on the subject matter of the patent, not merely voidable, in which latter case, if the circumstances justified such a decree, a direct proceeding with proper averments and evidence would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined, it is, nevertheless, a clear distinction established by law, and it has been often asserted in this court that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue." (125 U. S., pages 624-5).

In support of this view, the following authorities are cited:

Polk's Lessee vs. Wendell, 9 Cranch, 87.
New Orleans vs. United States, 10 Pet., 662, 730.
Wilcox vs. Jackson dem. McConnell, 13 Pet., 498, 509.
Stoddard vs. Chambers, 2 How., 284, 317.
Easton vs. Salisbury, 21 How., 426, 428.
Reichart vs. Felps, 6 Wall., 160.
Best vs. Polk, 18 Wall., 112, 117.
Leavenworth Railroad vs. United States, 92 U. S., 733.
Newhall vs. Sanger, 92 U. S., 761.
Sherman vs. Buick, 93 U. S., 209.
Smelting Co. vs. Kemp, 104 U. S., 636.
Steel vs. Smelting Co., 106 U. S., 447.
Kansas Pacific Railway Co. vs. Dunmeyer, 113 U. S., 629, 642.
Reynolds vs. Iron Silver Mining Co., 116 U. S., 687.

The same distinction is clearly pointed out in the case of the Smelting Co. vs. Kemp, 104 U. S., 636, cited by the Supreme Court of Colorado in support of the proposition, that the Downing deed could not be assailed in this action.

In Doolan vs. Carr and Smelting Co. vs. Kemp, the cases are all reviewed and the principle distinctly announced that a patent issued by the government may be assailed in an action at law, and that extrinsic evidence is admissible to show that the patent is void for want of jurisdiction of the subject matter or authority to issue it. Looking to the evidence excluded by the trial court, which will be noticed more fully presently, it will be seen that this is just what was sought to be done in this case.

The Supreme Court of Colorado seems to have ignored or overlooked this fact, holding that the execution and delivery of the deed for the lot in dispute by the Probate Judge of Arapahoe County, under and by virtue of the United States, and Colorado statutes providing for the entry and disposal of the Denver town site, was analogous to the granting of a patent by the land department of the government, and that the same conclusive presumptions attaching to a patent were applicable to the deed of a Probate Judge assuming to act under and by virtue of said town site laws. (See opinion of the Court Record, page 85, Anderson vs. Bartels, 7 Colo., 256; Chever vs. Horner, 11 Colo., 70.)

Whether any such analogy exists between the granting of a government patent, and the execution of deeds by probate judges as trustees by virtue of the provisions of such town site laws may well be doubted. We shall contend, hereafter, that all presumptions, if any do exist, arising in this case by reason of the execution of the deed in question, are disputable presumptions and subject to rebuttal. But assuming, for the purpose of argument that such analogy exists, nevertheless, we submit that the evidence excluded showed a want of authority in Probate Judge Downing to execute the deed to Hughes, and that by virtue of the express terms of said town site laws, the deed was absolutely void and of none effect.

2. We now call attention to this evidence. On page 53, folio 77 of the Record, it will be seen that the plaintiff offered in evidence the book of filing of claimants, under and by virtue of the 4th section of the act of Colorado Territory, kept by James Hall, the probate judge, who entered the Denver town site, for the purpose of showing that John Hughes, the grantee in said deed, never filed upon said lot, as required by said section of said act, and further to show who did file claim to said lot and who did not. To the introduction of said book objection was made, sustained by the court, and an exception reserved. No special reasons were assigned in support of the objection, and if the evidence was admissible for any purpose it should now be considered; also, on pages 65 and 66, folios 95 and 96 of the Record, the plaintiff, in rebuttal, proved by Robert Steele that he was Clerk of the County Court of Arapahoe County, Colorado; that he was then the custodian of the book of filings of occupants and claimants of lots in the Denver town site, made by James Hall, Probate Judge of Arapahoe County, Colorado, in 1865; also, that he had made an examination of the original filings remaining in his office for the purpose of ascertaining whether there was an original filing by John Hughes upon lot 10, block 176, which is the lot in dispute. The witness was then asked this question: "Were you able to find that filing?" To this question objection was made by defend-

ant's attorney, sustained by the court, and an exception reserved. No special reasons are assigned for this objection, but the record discloses that the object of the evidence was to prove that John Hughes never filed upon the lot in dispute at all, and that the custodian of the original filings was brought as a witness to prove such fact; that in connection with such proof, it was proposed to offer the book of filings to show that there was no record of such filing by Hughes. After the exclusion of the above evidence, the plaintiff attorney offered to prove, first, that "John Hughes, grantee mentioned in the deed from Jacob Downing, Probate Judge, bearing date October 24, 1867, never filed upon the lot in controversy within the ninety days provided by the act of the legislature of Colorado in 1864, nor at all; second, that at the time of the issuance of said deed of Jacob Downing, Probate Judge, to John Hughes, there was a filing upon the same lot by one J. M. Veasey, which had not at that time been withdrawn. Third, that said John Hughes was not a beneficiary under the trust act of Congress as to the lot in controversy, was not an occupant or entitled to its possession, nor had he any improvements whatever thereon." To this offer of proof the defendant's attorney objected. The objection was sustained, and exception reserved.

In order that the force and effect of this evidence, as tending to show a want of power or authority in Judge Downing to issue the deed in question to Hughes, we now call attention to some of the provisions of the the acts of Congress and territorial legislature creating the trust with respect to the Denver town site, and the rules and regulations directing the execution of such trust.

In section one of the act of May 28, 1864, for the relief of the citizens of Denver, it is provided that the act of Congress for the relief of citizens of towns upon the public lands, approved May 23, 1844, be so extended as to authorize the Probate Judge of Arapahoe County, Territory of Colorado, to enter section 33 and the west half of section 34, in township 3 south, range 68 west, "*in trust for the several use and benefit of the rightful occupants of said land, and the bona fide owners of the improvements thereon, according to their respective interest.*" In section two of this act it is further provided, "*that in all respects, except as herein modified, the execution of the foregoing provisions shall be controlled by the provisions of said act of May 23, 1844.*" In the act of May 23, 1844, we call attention to two controlling provisions, which we regard as important in the determination of the question with respect to the power and authority of Probate Judge Downing to execute the deed to Hughes, sought to be impeached in this action, viz.: that in the execution of said trust as to the disposal of the lots in such town, and the proceeds of the sale thereof, the same to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated; "*also, that any act of said trustees not made in conformity to the rules and regulations herein alluded to, shall be void and of none effect.*" (Statutes at Large, vol. 5, page 657).

In conformity with these provisions of said act of 1844, the legislature of Colorado Territory passed an act approved March 11, 1864, prescribing rules and regulations for the execution of the the trust arising under said act of May 23, 1844, which rules and regulations were subsequently followed by the probate judges of Arapahoe County, with respect to the disposal of lots situated within the limits of the Denver town site. The several sections of this act, defining the power and authority of the probate judge in the execution of the trust as to the disposal of said lots, will now be considered in connection with the evidence offered and excluded by the court.

By section 4 of this act, which we regard as of controlling importance on this point, it is provided as follows: "Each and every person, or association or company of persons, claiming to be an occupant or occupants, or to have possession, or to be entitled to the occupancy or possession of such lands, or to any lot, block or share therein, shall, within ninety days after the first publication of such notice, * * * sign a statement in writing, containing an accurate description of the particular parcel or parts of land in which he claims an interest, * * * and deliver the same into the office of the judge or judges, and all persons failing to sign and deliver such statement within the time specified in this section, shall be forever barred the the right of claiming or receiving such lands or any interest or estate therein, * * * in any court of law or equity." (Sess. Laws of Colo., 1864, page 140; also Rev. Statutes of Colo., 1868, page 620).

In the case of Cofield vs. McClelland, 16 Wall., pages 331, 335 and 336, this court considered the effect of this section and held that a failure to sign and deliver the statement required by this section forever barred the right of such claimant to such land both in law and equity.

The evidence excluded by the trial court in this case would have proved conclusively that John Hughes, grantee, mentioned in the deed of Probate Judge Downing, dated October 24, 1867, never filed upon the lot in controversy within the ninety days provided by this fourth section of the act of the territorial legislature above referred to. The offer of proof even went further and tended to show that Hughes never filed upon the lot as required by this section at all; under such circumstances we submit that Downing acting as trustee was not authorized to convey the lot to a party who had not filed upon it as claimant. The act of 1844 expressly provided that, *any* act of such trustee, not made in conformity with the rules and regulations enacted by the territorial legislature should be void and of no effect. If Hughes never filed a written statement claiming the lot in question within ninety days after publication of notice as required by said section as the evidence excluded tended to prove, the act of Downing conveying the lot to him in the absence of such filing was clearly in the language of said act of congress: "Void and of none effect," for the reason that the Probate Judge by the terms of said town site enactment had no jurisdiction, power, or lawful authority to make such deed. This view of the question is fully sustained by this court in the case of Cofield vs. McClelland cited, *supra*, pages 335-336.

3. By reference to the Record, page 66, folio 93, it will be seen that the plaintiff also offered to prove that at the time of the issuance of said deed of Probate Judge Downing, to said Hughes, there was a filing upon said lot by one J. M. Veasey, which had not been withdrawn at that time. Had this

evidence been admitted it would have appeared in evidence that at the time Downing issued the deed to Hughes there were two filings upon the lot in dispute, viz.: the filing of the plaintiff Chever (see Record, page 36, folio 53), and that of said Veasey; that these two adverse claims were undetermined at the time of executing and delivering said deed, but were subsequently determined by Probate Judge Kingsley in favor of said plaintiff, as appears by the recitals in his deed to the plaintiff in this suit. (See Record, 49 and 50, folio 72 and 73.

By the fifth section of said act of the territorial legislature, prescribing rules and regulations for the disposal of lots within the Denver town site, it is provided in case of adverse claimants that either party may bring suit in chancery against adverse claimants in any court of competent jurisdiction for the determination of the rights of such adverse claimants. In case no suit is brought by such adverse claimants as provided by said section five. It is then made the duty of the Probate Judge, by section eight of said act to summons said adverse claimants to appear before him at a time and place to be mentioned in such notice, to hear proofs and determine in writing the controversy between such adverse claimants. (See Sess. Laws of Colo., 1864, pages 140, 142; also Revised Statutes of Colorado, 1868, pages 621, 622.

By section 13 of said act it further provided, "that no such deed of conveyance shall be acknowledged or delivered for any part, lot, block or share of such lands, to which there shall be adverse or contesting claimants, until the controversy thereon shall have been settled or determined in the manner hereinbefore prescribed." (See Sess.

Laws of Colo., 1864, page 146; Rev. Stat., 1868, page 625.

By any fair interpretation of these sections of said act of the territorial legislature, it became the duty of Probate Judge Downing to summon all conflicting claimants and determine their rights, and until this is done, clearly by the terms of section 13, he is without jurisdiction, power or authority to convey lots to anyone."

Now the evidence excluded all went to show that there were adverse claimants to the lot in dispute. The book of filings kept by Probate Judge Hall would have proven the existance of such adverse claimants. The evidence of Steele, the custodian of this book, and the original filings was also competent as showing the existence of adverse claimants; and that Hughes never filed on the lot, all this evidence when taken in connection with the fact proven that plaintiff filed on the lot August 7, 1865, and as shown by the recitals of Probate Judge Kingsley's deed to plaintiff, tended to prove that the deed issued by Downing to Hughes was made and delivered without any authority, and without any effort whatever to determine the rights of these adverse claimants by notice or otherwise.

If the evidence excluded in any view was proper, and tended to show the existence of adverse claimants undetermined, for the lot in dispute, in the office of Downing at the time of issuing of said deed to Hughes, it must be assumed that the evidence would have been followed with proof that Downing took no steps whatever by summons or otherwise to settle and determine the rights of these adverse claimants, and it is quite clear that until they were so settled and determined, that by the express terms of the thirteenth section of said act the trustee was without authority to convey lots to any one, and in doing so his act, not being in conformity with said act, is void and of none effect. Polk's Lessee vs. Wendal, 5 Wheat., Star., pages 310-311, is in point as to the admissibility of this evidence. Again on page 66 of the record folio 96, the plaintiff offered to prove that the said John Hughes was not a beneficiary under said acts of Congress; that he was not an occupant, nor entitled to the possession of the said lot, nor had he any improvements whatever thereon, this offer was also excluded by the trial court and an exception reserved. In the exclusion of this offer of proof the trial court is upheld by the Supreme Court of Colorado upon the ground that the deed issued by Probate Judge Downing was conclusive of the rights of the parties, and not assailable in this action. In the grant of the Denver town site, both acts of Congress expressly provide that the entry of said lands by the Probate Judge is to be "in trust for the several use and benefit of the rightful occupants * * * and bona fide owners of the improvements thereon, according to the respective interest."

Upon this offer of proof the question arises whether the Probate Judge in the execution of the trust with respect to lots in the Denver town site has any jurisdiction power or authority to convey lots within this town site to a party who is not a beneficiary, within the meaning of said acts, or to put the question more direct in the language of said act, has the Probate Judge any authority whatever to convey such lots to a party who is not *an occupant, nor has any improvements thereon*, at the time of the entry of the town site? We submit that upon any fair interpretation of these town site acts the Probate Judge, as such trustee, has no such power or authority; and that any deed or deeds conveying lots to parties not beneficiaries, by the provisions of the act of congress of May 23, 1844, must be held to be void and of none effect.

The general rule applicable to trusts of this kind is, "that the power given must be strictly executed as given, or it will remain as a trust for the person or class in whose favor it is given." (Perry on Trusts, Vol. 1, Sec. 254). Or, as stated by the same author in another section, "The rule is rigidly adhered to that powers can be executed only in the mode, and at the time, and upon the conditions prescribed in the instrument creating the trust or power."

Perry on Trusts, Vol. 2, Sec. 511*b*.
Story's Eqty. Jur., Vol. 1, Sec. 173; Vol. 2, Sec. 1393.
Moore vs. Diman, 5 R. J., 130.

Judge Story, commenting on this proposition, says: "An act which violates the very purpose for which the power was conferred, and the very control over it which it meant to vest in the donee is repugnant to it, and cannot be deemed in any just sense to be in execution of it. (See Vol. 1, Sec. 173.)

These principles have frequently been applied by courts in the interpretation of town site laws.

Treadway vs. Wilder, 8 Nev., 98.
Same case, 9 Ibid, 71.
Mankato vs. Meager, 17 Minn. Gill., 2, page, 256, old Ed., 265.
Edwards vs. Tracy, 2 Mon., 49.

Hull vs. Ashby, 2 Ibid, 492.
Ming vs. Truitt, 1 Ibid, 322.
Rathborne vs. Sterling, 25 Kas., 388.
Tecumpsa Town Site Case, 3 Neb., 284.
Cofield vs. McClelland, 16 Wall., 281.

The case cited from 8 and 9 Nev. was an action of ejectment. The defense assailed the deed issued for a portion of the premises in controversy, issued by the trustee under the provision of the town site statutes of the State, upon the ground that the plaintiff, grantee of said trustee, was not an actual occupant or entitled to the deed, and that for this reason the trustee had no authority to issue it. The plaintiff claimed, as is done in this case, that the action of the trustee in issuing the deed was conclusive, and not open to attack in an action of ejectment. Upon this proposition the court says: "We do not think this position can be maintained upon reason or authority, *if the plaintiff was not an actual occupant or entitled to the occupancy of this land, he was not, under the law of Congress or of the State, entitled to the deed, and the trustee had no authority to execute it.*"

9 Nev., page 71; 8 Nev., 98 and 99.

In the case of Edwards vs. Tracy, 2 Mon., page 49, cited above, it is held that the trustee of a town site, under the United States and territorial statutes, has no right to make a deed to a vacant lot to a citizen who is not in the possession of, or without the right of possession to the premises."

In the case of Cofield vs. McClelland, cited, *supra*, this court adopts the same interpretation with respect to the town site laws now under consideration. Justice Hunt speaking for the court says: "*Those in possession of the land when the entry shall be made by the Probate Judge, are the persons for whom he holds the lands in trust and to whom he is to make the respective deeds.*" (16 Wall., 334). This interpretation of these statutes is clearly sustained by all authorities and in its application to cases arising under these enactments it is uniformally held that the Probate Judge, acting as such trustee in the execution of deeds, is without authority to make conveyances to parties who are not occupants or in possession, or who have not filed a statement claiming such lots, and the same rule we submit, must apply to deeds executed to parties while adverse claims on the property remain unsettled or underttermined. Deeds so issued to parties not entitled to the lands must by the terms of the statute be held void and of no effect.

4. On page 67 of the Record, folio 96, the plaintiff offered to prove that on and prior to the 23rd day of May, 1873, he was in the possession of the lot in controversy, that he had built a fence around the same, and that afterwards defendant Horner broke through said fence, moved a frame house upon said lot, took possession of it, and ousted the plaintiff therefrom. This offer of proof was also excluded by the court and an exception reserved. Error was assigned on this exception, (See Record page 69, folio 96,) but in the opinion filed it will be seen that the Supreme Court of Colorado makes no reference to it. We now submit that this evidence was competent in rebuttal, as tending to prove the plaintiff's prior occupancy and possession of said lot. Both parties derive title by deeds issued by Probate Judges assuming to act under and by virtue of the power and authority conferred by the

United States and Colorado, Denver town site enactments, with respect to the execution of said trusts and disposal of the lots within the limits of said town site.

We shall contend hereafter that any and all presumptions to be indulged in considering the facts disclosed in this record, with respect to the issuing of the several deeds by the probate judges as trustees to both plaintiff and defendant are merely *prima facia* and subject to rebuttal. Assuming then that from the recitals contained in the deed of Downing to Hughes, the presumption is to be indulged that Hughes was an occupant or in possession of said lot as a beneficiary under said acts, it was certainly competent for the plaintiff to rebut such presumption by showing that the plaintiff was in possession of the lot and owner of the improvements thereon prior to being ousted by the defendant Horner, as stated in the offer of proof. The proof tended to show possession back to the entry of the Denver town site, and the time of the filing of plaintiff's statement claiming said lot, as a beneficiary under said town site laws.

But we think the evidence was competent for another reason. We concede the maxim that the plaintiff must recover upon the strength of his own title and not on the weakness of the defendant's. Nevertheless, upon the assumption that the Hughes deed was void, and that the defendant Horner, as his grantee, has shown no title whatever to the lot in dispute, then we submit that it was competent for the plaintiff to show actual prior possession, in which case he may recover from a mere trespasser who has no title.

Christee vs. Scott, 14 How., 292.

II.

The principal question involved in our second proposition is, whether upon the evidence contained in the Record the finding and judgment of the trial court should not have been for the plaintiff instead of the defendant. We contend that this evidence shows an older and superior title to the lot in dispute in the plaintiff, than that relied upon by the defendant Horner. Both parties, as stated before, claim title under and by virtue of deeds executed and delivered by Probate Judges of Arapahoe County, Colorado, assuming to act as trustees, under the provisions of the aforesaid Denver town site laws. And the question presented by the pleadings and evidence is, which one of these deeds conveys the older and superior title to the lot in dispute—the one issued by Probate Judge Kingsley to the plaintiff, or that of Probate Judge Downing to John Hughes, under which the defendant Horner claims to derive title. The determination of this question requires a careful examination of the evidence in the case, in connection with the powers and authority delegated to said judges in making deeds to beneficiaries and claimants, under the provisions of said town site enactments. If the evidence now in the Record discloses the fact that Probate Judge Downing, in his deed of October 24, 1867, conveyed the lot in question to a party not entitled thereto, either as a beneficiary or claimant under said town site laws, then we submit that the deed by the terms of these laws is void, and of none effect, and that the deed executed by Judge Kingsley, showing as it does upon its face full compliance with said statutes, must be regarded as conveying the older and superior title to the plaintiff. It will be observed by the recitals of the Kingsley deed that two lots, numbered 23 and 24, in block 166, were conveyed to the plaintiff under and by virtue of an act of the territorial legislature, approved February 8, 1872, while lot 10, block 176, the lot in dispute, was conveyed to plaintiff under the provisions of the said territorial act of March 11, 1864. It is proper, we think, by way of explanation, to state that the Supreme Court of Colorado, in the case of the City of Denver vs. Kent, 1 Colo., 336, in construing the territorial act of 1864, held that no provision was made authorizing the Probate Judge, as trustee, to make conveyances of lots not filed upon within the ninety days, as provided in section four of said act. This omission led to the passage of the act of February 8, 1872, referred to in the Kingsley deed. The question to be considered in this case relates only to lot 10, block 176, named in said deed as issued under and by virtue of the act of March 11, 1864.

1. In support to the plaintiff's title to the lot in controversy the following facts are proven, as appears by the record: 1. The entry of the Denver town site by Probate Judge Hall in trust for the several use and benefit of the rightful occupants of Denver City and the *bona fide* owners of the improvements thereon as provided in the act of Congress of May 28, 1864, as evidenced by the receipt of the receiver of the land office and patent of the United States government therefore. (See record pages 24 25, folios 37 39). 2. Deeds conveying the unexecuted parts of said trust from James Hall to Omer O. Kent, his successor in office; from Omer O. Kent to Jacob Downing, his successor in office;

from Jacob Downing to Henry A. Clough, his successor in office; and from Henry A. Clough to William C. Kingsley, his successor in office. (See Record pages 27 to 35.) 3. That plaintiff Chever filed on the lot in question August 7, 1865. As required by the fourth section of said act of Colorado territory. 4. A deed from William C. Kingsley, Probate Judge as trustee to the plaintiff in this suit, conveying the lot in controversy with other lots not in dispute in this case.

This evidence, *prima facie*, clearly proved title in fee in the plaintiff and is ample and sufficient to sustain a recovery in his favor. The burden then rested upon the defendant Horner to show a better title in fee in himself under the issues in the case. For this purpose he introduced the deed from Downing to Hughes, dated October 24, 1867, which was objected to by the plaintiff for reasons assigned in the Record, the objections were overruled and exceptions reserved, (Record pages 53 and 54, folio 78), this was followed by a deed from Hughes and a decree of court in partition proceeding vesting title in said defendant Horner. The admission of this evidence was assigned as error in the Supreme Court of Colorado. (See Record, page 68, folios 99-100). The view adopted by the court with respect to the force and effect of this deed made it unnecessary to notice this error. We propose, however, to call attention to the admission of this evidence hereafter in the discussion of the question as to what, if any, presumptions are to be indulged upon the facts in evidence with respect to the authority of the Probate Judge Downing as trustee to issue it.

On the question, which of the two deeds conveyed the prior and superior title, we contend that as it appeared in evidence that the plaintiff Chever filed upon the lot August 7, 1865; the issuance of the Kingsley deed must relate back to that date. It is a well settled rule of law that "where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts shall have relation.

Viner's Abb. Title Relation, 290.
Cruise on Real Prop., Vol. 5, 510, 511.
Landes, vs. Brant, 10 How., 371, 372.
Jackson vs. McMichael, 3 Cow., 75.
Crowley vs. Wall, 12 Mo., 145.

This principle has been frequently applied to cases where two patents have been issued by the United States government for the same property, and the junior conveyance in date by relation has been held to convey the superior and better title.

Moore vs. Wilkinson, 13 Cal., 488.
Stark vs. Barrett, 15 Cal., 366.
Leese vs. Clark, 18 Ibid., 571.
Tonchurd vs. Crow, 20 Ibid., 161.
Semple vs. Huger, 27 Ibid., 168.
Morrell vs. Chapman, 35 Ib., 88.
Beard vs. Federy, 3 Wall, 491.
Henshaw vs. Bissell, 18 Wall., 239, 240.
French vs. Spencer, 21 How., 239, 240.
Grisar vs. McDowell, 6 Wall., 380.
Shepley vs. Cowan, 91 U. S., 330.

It appears from the evidence that the plaintiff filed upon the lot in dispute on the 7th of August, 1865, in compliance with the 4th section of the act of the territorial legislature. By this initiatory step the plaintiff secured a vested right which, when followed up by the issuing of a deed by the trustee, gives the older and better right to the premises. In such cases the deed "relates back to the date of the initiatory act and cuts off all intervening claimants. (Shepley vs. Cowan, 91 U. S., 330, 338. Henshaw vs. Bissell, 18 Wall., 255, 264).

Where two patents are issued by the government, the rule does not rest upon the question whether the first in date carries the legal title and the second the equitable, but upon the fact that the initiatory steps being first taken in compliance with the law secures to the party a vested right. In Lessee of French vs. Spencer, 21 How., cited, *supra*, page 240, the rule is stated as follows: "It is also the settled doctrine of this court, that an entry in a United States land office, on which a patent issues (no matter how long after the entry is made), shall relate to the entry and take date with it. (Ross vs. Barland, 1 Pet., 655). The fiction of relation is that an intermediate bona fide alience of the incipient interest may claim that the patent inures to his benefit by an *expost facto* operation, and receives the same protection at law that a court of equity could afford him." Again, in Gibson vs. Chouteau, 13 Wall, pages 100–101, the same rule is even more fully announced.

Now we respectfully submit that the Supreme Court of Colorado, in the opinion filed in this case (see Record, page 74, folio 113), has misconceived the force and effect of the doctrine of relation, as announced by this court in the authorities cited, and as applicable to the facts of the case at bar. Nearly all the cases cited are actions of ejectment, and the rule is held to apply. The application of the rule does not depend upon the question whether the elder conveyance in date carries the legal title for the purpose of maintaining the action at law or not, but upon the fact that the junior patent gives the better right, and should, in justice, bear date of the time of taking the initiatory steps to secure the land.

With respect to the distinctions pointed out by the Supreme Court of Colorado, as to the applicability of the decisions of this court on the question of relation, as applicable to the facts of this case, little need be said. The reasons assigned by the judge writing the opinion seems to us to be in conflict with the decisions of this court. The rule seems applicable to the issuance of deeds as well as patents. Several of the cases cited in this court support this view, and why the rule should not apply to the issuance of a deed by the probate judge assuming to act under town site laws is difficult for us to understand.

If the issuing of deeds by such judge as trustee is to be regarded as analogous to the issuing of a patent by the officers of the land department, and subject to the same rules of presumptions as to the regularity of their issuance: We do not understand why deeds issued by said judges as trustees under the provisions of the Denver town site laws, are not also analogous to the issuance of patents by the officers of the land department, with respect to the application of the doctrine of relation, and especially so when it appears from the evidence, that at the time Judge Downing, as trustee, executed and delivered said deed to Hughes. The plaintiff's claim to said lot remained of record in his office, and so remained unsettled, until his successor in office, Judge Kingsley, determined the plaintiff's right so acquired by filing his claim for said lot and executed and delivered to him the deed now in evidence, dated May 7, 1875.

2. It further remains to consider the kind of presumptions applicable and how far they are to be indulged upon the facts proven in this case in support of the plaintiff title. We submit in the out set, that there is no room for the indulgence of conclusive presumptions, and if any presumptions whatever arise upon the facts in evidence, they are *prima facie* only and subject to rebuttal. Neither of the parties claim title by reason of long continued adverse possession, or lapse of time, and therefore conclusive presumption on this ground are wholly inapplicable. The power or authority of a Probate Judge, to make deeds as trustee, to beneficiaries, under and by virtue of the Denver town site laws, are so dissimilar to the laws of the government, authorizing the issuing of patents, as to make the rule with respect to conclusive presumptions in the case of the patent, entirely inapplicable to the case of issuing said deeds under the provisions of said town site laws. It cannot be said that the Downing-Hughes deed rises to the dignity of a judicial act so as to call for the application of conclusive presumptions with respect to its regularity. If the deed in any sense is to be regarded as a judicial record, then it can only be regarded as record of an inferior tribunal with statutory powers strictly to be observed in the issuing of such deeds, in which case the authority to act should appear upon the face of the record, all these questions have repeatedly been considered by this court, and with respect to their application of the facts of this

case, we feel it unnecessary to do more than simply call attention to them.

We now submit that all presumptions arising upon the evidence in this case, are *prima facie* only, and subject to rebuttal, and that all such presumptions are to be indulged, in support of regularity in the issuance of the Kingsley deed to plaintiff, as in the issuance of the Downing-Hughes deed, under which the defendant Horner claims title in fee.

It will be seen from the opinion of the Supreme Court of Colorado, filed in this case, that no presumptions whatever are indulged with respect to the regularity of the Kingsley deed, and that the force and effect of the evidence introduced in behalf of the plaintiff in support of it, and of his right to the lot in controversy, is entirely overthrown by the application of presumption liberally indulged in support of the regularity of the issuance of the Downing-Hughes deed. The Judge writing the opinion says with respect to this deed: "It seems from these recitals that the deed is neither void upon its face nor silent as to the authority of the officers to execute it, they are sufficient under the principles announced and the authorities cited in support thereof to raise the presumption, in an action of this character, that the necessary initiatory steps were taken in conformity with the law." The same thing may be said of the Kingsley deed, from its recitals it is neither void upon its face, nor silent as to the authority of the judge to execute it. In view of the fact shown by the evidence that the plaintiff filed upon the lot on the seventh of August, 1865, it certainly ought to have been sufficient to raise the presumption in this action that the necessary initiatory steps were taken by the plaintiff in conformity to the law to secure his right to the lot.

It appears from the plaintiff's evidence that he filed upon the lot August 7, 1865, as claimant under said town site laws. It also appears from the recitals in the Kingsley deed, which must be regarded with greater dignity than the Downing-Hughes deed, because it states facts, not conclusions, that the plaintiff filed upon said lot, and, notwithstanding said filing which appeared of record that Jacob Downing, then Probate Judge, deeded said lot, on the twenty-fourth of October, 1867, to John Hughes, who did not appear by record to be entitled to it. These were all material facts proven in support of the plaintiff's right to the lot, and cannot, we insist be overthrown by the application of conclusive presumptions, based upon the indefinite recitals contained in the Downing-Hughes deed, under which defendant Horner claims title in fee. Upon this state of facts, we submit that any presumptions to be indulged in favor of the Downing-Hughes deed were disputable, that with respect to the acts of trustees they "are indulged only to supply facts; they are never indulged against ascertained and established facts, when these appear, presumptions disappear."

Lincoln vs. French, 105 U. S., 617.
Fresh vs. Gilson, 16 Pet., 327.

The fact then appearing in evidence that the plaintiff took the proper initiatory steps to secure title to the lot, as required by the 4th section of the act of the territorial legislature, and that Downing deeded the lot to Hughes, who did not appear of record to be entitled to it, raises the presumption that Downing, at the time of making the deed to Hughes, was cognizant from the records of his office that the plaintiff had filed upon the lot, and that his right thus secured was undetermined. Now, in such case, it became his duty, by the 8th section of said act of the territorial legislature, to summon all adverse claimants, hear proof and determine in *writing* the controversy between such claimant; and by section 13 of said act it is provided that no deed of conveyance shall be made until the controversy between such adverse claimants shall have been determined. (See Sess. Laws Colo., 1864, pages 142, 146; Rev. Stat. Colo., 1868, pages 622, 623, 625).

The Downing-Hughes deed is introduced in evidence to overthrow the material facts proven in support of the Kingsley deed on which the plaintiff relies for a recovery, there is nothing upon the face of the Downing-Hughes deed to rebut the fact of plaintiff claim filing to said lot or that it did not appear of record that Hughes was not entitled to said lot, nor is there a single fact stated upon the face of this deed, upon which to base or indulge a presumption that Chever was summoned by him, and testimony heard, and his right to the lot determined at or before the issuing of the deed to Hughes. It is made a prerequisite by the statute that the determination of the rights of adverse claimants shall be in writing. The rule was a reasonable one, its purpose was clearly to preserve the Probate Judges determination in such cases, and it ought to appear either of record in his office or upon the face of the deed issued by him after such hearing. If no such hearing took place in this case then the issuing of the deed to Hughes was inhibited by the thirteenth section of the territoral act before cited. If any such determination of the plaintiffs right so acquired by filing his claim to the lot, ever took place, it must be, by the terms of the act, in writing and should either be produced in evidence or appear upon the face of the deed. In the absence of such written proof of this material fact it must be presumed that the controversy was never settled as provided in Section 8 of said act, until the execution of the Kingsley deed to the plaintiff and that the deed to Hughes who did not appear of record to be entitled to the lot, was executed without any investigation whatever of the rights of adverse claimants, and in direct violation of the thirteenth section of said act,

The recitals in the Hughes deed present only a conclusion of law, no facts, are stated on which to base a presumption that Hughes filed upon the lot, or that a controversy between him and the plaintiff ever took place, or that he was in any sense entitled to a deed for the lot as a beneficiary under said town site laws. Now presumptions are never held to be a substitute for proof of independent material facts.

United States vs. Ross, 92 U. S., 283.
Manning vs. Insurance Co., 100 U. S., 694.

The fact that the Downing-Hughes deed bears date anterior to the date of the Kingsley deed, is immaterial in the absence of proof that Hughes filed a written statement claiming the lot under section 4 of the territorial legislature. It cannot be assumed from the general recitals of the deed that such a filing existed in the records of Downing's office at the time of the issuance of the deed, and by such presumption overthrow the independent material facts proven; that the plaintiff did file upon the lot and received a deed from the trustee recting these essential facts upon its f[illegible]e. As already shown, this deed relates back to the date of the plaintiff's filing, and gives the older and superior title to the lot.

Nor is it to be assumed, from the general recitals in the Hughes deed, that it conveyed the legal title to the lot. In order to overthrow the proof in support of the plaintiff's case, it should be proven that Hughes filed upon the lot as an adverse claimant, that prior to the execution of the deed Downing summoned the plaintiffs, heard their proof and determined in writing the controversy between such adverse claimants. This writing should be produced in support of the deed or its loss accounted for. This proceeding was necessary before issuing the deed, unless the controversy was so determined th[illegible] the probate judge was not authorized to issue the deed, and if issued it was void and of none effect. If the deed was void it will not be pretended that, under the circumstances of this case, it can be made valid by the application of conclusive or any other character of presumption.

If the issuing of the Hughes deed was without authority, the trust by the general rule, as shown already, as well as by the provisions of the statute, remained to be executed by Downing's successor in office. We submit, therefore, that the recital in the Downing-Hughes deed, do not, without additional proof show authority in Probate Judge Downing to execute said deed to Hughes. On its face it has not the semblance of a judicial record; it does not purport to determine controversies between adverse claimants; and yet the evidence shows that such controversies existed at the time of its issuance, there is nothing upon the face of the deed upon which to base the presumption that it was issued in conformity with the rules and regulations prescribed by the territorial legislature for the disposal of lots within the limits of the Denver town site; and, therefore, insufficient to overthrow the plaintiff's right of recovery in the case.

In this view the deed was not admissible in evidence without proof showing that it was regularly issued in conformity with the law, and the exception of the plaintiff to its admissibility ought to have been sustained. On the whole case we contend that the plaintiff has been deprived of a substantial right acquired in conformity with the aforesaid town site enactment, by the ruling of the trial court, and the Supreme Court of Colorado. That the judgment should be reversed and judgment rendered in favor of the plaintiff.

J. Q. CHARLES,

Attorney for Plaintiff in Error.

APPENDIX.

We append the essential portions of the sections of the act of the Territorial Legislature of Colorado, heretofore referred to in our argument.

Section 4 is quoted in the argument.

Section 8. In case suits shall not be brought, as provided in this act, for the purpose of settling or determining any controversy between adverse claimants to any such lands, within sixty days after the expiration of the time for filing the statement, as provided in Section 4 of this act * * * * * it shall be the duty of such judge to summon the adverse claimant to appear before him at a time and place to be mentioned in such notice * * * and make their proof and allegations in reference to such adverse claim, at the time and place of the return of such summons. If the same shall have been served as provided in this act, the judge shall, if the parties appear, proceed to hear their proof and allegations, and shall thereupon determine, in writing, the controversy between them. Upon such hearing, the statements of the parties respectively deposited with such judge as required by the fourth section of this act, shall stand for their pleadings, and either party may use in evidence the statement by the other, or by the person under whom he or she claims. The evidence of the witnesses sworn upon such trial shall be reduced to writing.

Sec. 13. * * * * "*Provided however*, That no such deed of conveyance shall be acknowledged or delivered for any part, lot, block or share of such lands, to which there shall be adverse or contesting claimants until the controversy thereon shall have been settled or determined, in the manner hereinbefore prescribed, and whenever any such controversy shall have been so settled and determined, the corporate authorities, or judge, or judges, shall, upon the like demand or request, * * * * convey the lands, or interest or shares therein, the right to which shall have been thus ascertained, to the person or persons thereby determined to be entitled to the same.